

ARTICLES

**PRIVATIZING EMINENT DOMAIN: THE
DELEGATION OF A VERY PUBLIC POWER
TO PRIVATE, NON-PROFIT AND
CHARITABLE CORPORATIONS**

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INTRODUCTION

It is no secret that federal and state governments increasingly contract out a number of responsibilities and functions to private parties, from prison management¹ to health care² to warfare.³ It is

1. See David N. Wecht, Note, *Breaking the Code of Deference: Judicial Review of Private Prisons*, 96 YALE L.J. 815, 818 (1987) (“Private for-profit firms now operate approximately two dozen major facilities, including at least three medium or maximum security adult correctional institutions.”); see also Ira P. Robbins, *The Impact*

fathomable that almost any governmental function could be outsourced to a private party.⁴ However, should eminent domain, often viewed as the most public of powers,⁵ be among them?

This question fundamentally arises when the takings power is transferred or delegated to private, non-profit or charitable corporations that are unelected by the people, unappointed by a public official, and not employed by government.⁶ A lack of accountability by these private delegates of the takings power serves to increase the potential for abuse of this public power, stemming from the conflicting interests of the private delegate and the public.

In the wake of *Kelo v. City of New London*,⁷ for-profit private entities have garnered the most attention from legislators and the public, given the benefits that may accrue to them when government uses takings as part of an “integrated”⁸ or “comprehensive”⁹ economic

of the Delegation Doctrine on Prison Privatization, 35 UCLA L. REV. 911, 911-12 (1988) (noting that prison overcrowding is “pervasive” and that privatizing correctional facilities has been proposed to reduce the overcrowding problem).

2. See Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 552 (2000) (stating that “[i]n the last half century, the private nonprofit sector has become the primary mechanism for delivering government-financed human services, such as health care”). In addition, the Article goes on to note that outside of health care, local governments have also contracted out their waste management and highway construction services. *Id.*

3. See Daniel Bergner, *The Other Army*, N.Y. TIMES, Aug. 14, 2005, at 29. (“Private gunmen . . . are now guarding four U.S. generals . . . [a]nd throughout Iraq, the defense of essential military sites like depots of captured munitions has been informally shared by private soldiers and U.S. troops. If the 25,000 figure is accurate, the [private] businesses add about 16 percent to the coalition’s total forces.”).

4. See David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 647-48 (1986) (noting that “almost any power or function exercised by a government, particularly a state or local government, can also be exercised, unremarked, by some clearly private actor”).

5. See *id.* at 648 (“Accepting some fuzziness at the edges, we do recognize certain powers as essentially governmental: rulemaking, adjudication of rights, *seizure of person or property*, licensing and taxation. These powers share the element of coercion, of making someone do something he does not choose to do or preventing him from doing what he wishes to do.”) (emphasis added); see also Louis L. Jaffe, *An Essay on Delegation of Legislative Power: II*, 47 COLUM. L. REV. 561, 586 (1947) (“It is when delegated power affects the use of real property or the practice of a profession that the judicial nerve tingles.”).

6. See *Texas Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 469 (Tex. 1994) (stating that “[m]ore fundamentally, the basic concept of democratic rule under a republican form of government is compromised when public powers are abandoned to those who are neither elected by the people, appointed by a public official or entity, nor employed by the government.”).

7. 125 S. Ct. 2655 (2005). Justice Stevens wrote the majority opinion in which Justices Kennedy, Souter, Ginsburg, and Breyer joined. Justice O’Connor authored a dissenting opinion in which Justices Rehnquist, Scalia, and Thomas joined. Justice Kennedy wrote a separate concurring opinion, and Justice Thomas filed a separate dissenting opinion.

8. *Id.* at 2666-67.

development plan. These plans may provide revenue expansion to for-profit corporations, but also to the public in the form of increased property and sales tax revenues and additional jobs. Despite all the attention that *Kelo* generated towards the part played by for-profit corporations in the eminent domain arena, private non-profit and charitable corporations, that have been delegated the takings power by state legislatures, have managed to slip under the public's and lawmakers' eminent domain radar screens. These non-profit entities have generally evaded the sort of scrutiny and detection that not only government, but also private for-profit corporations that may exercise significant influence upon government in takings,¹⁰ have historically attracted as a matter of course. When eminent domain is delegated to private non-profit and charitable corporations, stricter scrutiny of these delegations is often warranted, given the conflicting interests between the private delegate and the public that might lead to abusive exercises of the power.

As a preliminary matter, this Article will use the term "private, non-profit corporations" as a global term for non-profit and charitable corporations, as well as for charitable organizations and urban redevelopment corporations. The common link in the nomenclature is that these corporations are largely organized for a purpose outside of engendering profits for shareholders. Their purpose is geared towards charitable or benevolent aims.¹¹ Secondly, these corporations are largely entitled to favorable tax treatment.¹²

9. *Id.* at 2668.

10. See, e.g., regarding *Kelo* and the residents in New London, Ted Mann, *Pfizer's Fingerprints on Fort Trumbull Plan*, THE DAY, Oct. 16, 2005, at A1; Jane Ellen Dee, *Oh, Claire You're a Scholar and a Visionary . . . If Only You Could Quit Leaving Skin on the Sidewalk*, HARTFORD COURANT, Feb. 25, 2001, at 5; see also Barry Yeoman, *Whose House Is It Anyway?*, AARP Mag. Online, Nov. 3, 2005, http://www.aarpmagazine.org/money/whose_house_is_it_anyway.html (discussing the outcry against the City of New London and Pfizer Corporation upon the city's decision to use eminent domain to acquire parcels of land in the Fort Trumbull neighborhood). Another infamous example is found in *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 459 (Mich. 1981) (upholding a Michigan quick-take statute that allowed the city of Detroit to take land in the Poletown neighborhood and to transfer it to General Motors for the construction of a Cadillac auto plant because the public benefits promised by the plant were substantial); see also Elizabeth F. Gallagher, Note, *Breaking New Ground: Using Eminent Domain for Economic Development*, 73 FORDHAM L. REV. 1837, 1868 (2005) (discussing that residents in Poletown banded together to form the Poletown Neighborhood Council to contest the takings and noting that, in *Kelo*, property owners who opposed the takings organized to file a lawsuit).

11. For instance, Black's Law Dictionary defines a non-profit corporation as "a corporation organized for some purpose other than making a profit, and usually afforded special tax treatment—[a]lso termed not-for-profit corporation." BLACK'S LAW DICTIONARY 343 (7th ed. 1999). In addition, Black's Law Dictionary defines a charitable corporation as "[a] nonprofit corporation that is dedicated to benevolent

This Article will assert that the problem of unaccountable delegations of eminent domain power to private non-profit and charitable corporations by state legislatures may be viewed through the legal prism of state versions of the Private Non-Delegation Doctrine. Although essentially dormant in the federal courts, the Private Non-Delegation Doctrine has enjoyed remarkable vigor on the state court level. In addition, this Article will also propose that the eight-part constitutional test constructed by the Texas Supreme Court in *Texas Boll Weevil Eradication Foundation v. Abbott*,¹³ that examines the state constitutionality of private delegations of public power, be used as a model to assess similarly the state constitutionality of the delegation of eminent domain power to private non-profit and charitable corporations. Further, for those state legislatures that have delegated or are contemplating delegation of eminent domain power to private non-profit or charitable corporations, this Article will also propose a number of statutory solutions that would permit delegations of eminent domain power to private non-profit and charitable corporations to survive state constitutional scrutiny under state delegation and constitutional tests such as the test constructed by the Texas court.

Accordingly, Part I of this Article will explain the Private Non-Delegation Doctrine and its nexus to eminent domain. Part II will then examine the rationales for the delegation of the takings power to non-profit and charitable corporations and arguments weighing against these delegations. Part II will also discuss the principles supporting and disfavoring the wholesale abolishment of the delegation of eminent domain power to private, non-profit and charitable corporations, using the Massachusetts case study discussed in Part IV of the Article to argue against a per se rule against these delegations. Part III will introduce and discuss the *Texas Boll Weevil* test, a model test that this Article argues may be applied by other state courts to assess the constitutionality of private delegations of public power under the Private Non-Delegation Doctrine, and in particular, the private delegation of the takings power. Part IV will then present

purposes and thus entitled to special tax status under the Internal Revenue Code—[a]lso termed eleemosynary corporation.” *Id.* Finally, the same source describes a charitable organization as a “[a] tax-exempt organization that (1) is organized and operated exclusively for religious, scientific, literary, educational, athletic, public-safety, or community-service purposes, (2) does not distribute earnings for the benefit of private individuals, and (3) does not participate in any political candidate campaigns, or engage in substantial lobbying” (citing I.R.C. § 501(c)(3)). *Id.*

12. *Id.*

13. 952 S.W.2d 454 (1997).

two case studies in which eminent domain power has been delegated to private non-profit or charitable institutions and apply the *Texas Boll Weevil* test to each. Part V will propose seven legislative solutions, including Social Capital Impact Assessments (“SCIAs”), which may be used to address any state constitutional failings under the Private Non-Delegation Doctrine of private delegations of the public takings power.

I. THE PRIVATE NON-DELEGATION DOCTRINE (“PNDD”)

A. History

The general rule of non-delegation theoretically concerns the conveyance of constitutionally assigned power to either another branch of government that may not be constitutionally authorized to wield it or to a non-governmental body.¹⁴ In the former instance, the *Public* Non-Delegation Doctrine may be invoked when, for example, the constitutionally assigned power of the judiciary is transferred to the chief executive or to its agencies, when executive power allocated by a constitution has been expropriated to the legislative branch of government, or more commonly when legislative power is transmitted to the executive.¹⁵ Similarly, the *Private* Non-Delegation

14. See Peter H. Aranson, Ernest Gellhorn, & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 3-4 (1982) (noting that “[t]he delegation doctrine also has a theoretical application to the transfer of *any* government power.”) (emphasis added). In addition, the most common federal and state source of the public and private non-delegation doctrine is separation of powers. Separation of powers notes that each branch of government has power that has been primarily allocated to it and that a branch of government may not abdicate the exercise of this power to another branch or to another party. See, e.g., *id.* at 2-4 (“Madison’s practical view of the separation-of-powers concept also provides an analogy and support for the doctrine of American constitutional law that the powers of one branch of government should not be wholly delegated to another.”); SOTIROS A. BARBER, *THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER* 24 (Univ. of Chi. 1975) (stating that “the rule of nondelegation is more frequently and regularly associated with the separation of powers than it is with any other concept.”); *Texas Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 467 (Tex. 1994) (“More commonly, however, Texas has rooted its delegation jurisprudence only in the principle of separation of powers.”). But see *Proctor v. Andrews*, 972 S.W.2d 729, 733 (Tex. 1998) (contradicting the source of the Private Non-Delegation Doctrine noted in *Texas Boll Weevil* as stemming from Article III, Section 1 of the Texas Constitution that vests law-making power in the legislative branch instead of in Article II, Section 1 of the Texas Constitution that requires separation of powers between the legislative, executive, and judicial branches of government, as the concept of separation of powers as a source of the Private Non-Delegation Doctrine is irrelevant to a non-governmental actor that is not a part of any branch of government).

15. See Aranson, *supra* note 14, at 4 (suggesting that the general non-delegation doctrine could theoretically be applied to “[t]he transfer of judicial power to

Doctrine has been most frequently used by courts, especially at the state level, to assess the state constitutionality of a transfer or delegation of legislative power to non-governmental actors or to private parties.¹⁶

executive agencies,” transfers of “executive power to the legislature,” but is most commonly applied to conveyances of “legislative power to the executive.”). Indeed, the issue of the delegation of legislative power to the executive was examined by John Locke, who noted:

“the Legislative cannot transfer the Power of Making Laws to any other hands. For it being but a delegated Power from the People, they, who have it, cannot pass it over to others. . . . And when the people have said, We will submit to rules, and be governed by Laws made by such Men, and in such Forms, no Body else can say other Men shall make Laws for them; nor can the people be bound by any Laws but such as are Enacted by those, whom they have Chosen, and Authorised to make Laws for them. The power of the Legislative being derived from the People by a positive voluntary Grant and Institution, can be no other, than what the positive Grant conveyed, which being only to make Laws, and not to make Legislators, the Legislative can have no power to transfer their Authority of making laws, and place it in other hands.”

JOHN LOCKE, TWO TREATISES OF GOVERNMENT 380-81 (2d Treatise) (Cambridge Univ. Press, 1960).

16. For instance, the Supreme Court’s consideration of the delegation of legislative power to private parties began and ended with *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), a decision in which the Court overturned the Bituminous Coal Conservation Act of 1935 that called for the delegation of congressional power to private producers of coal that elected twenty-three boards to set minimum coal prices for each district and that also set pay rates and working hours for mining workers. Coal producers who chose not to participate in the boards were subject to a fifteen percent assessment on their sales of coal. However, in the state courts, the Private Non-Delegation Doctrine has been used in recent years to examine the delegation of legislative power to private parties. See, e.g., A. Michael Froomkin, *Thirtieth Annual Administrative Law Issue Governance of the Internet: Article Wrong Turn in Cyberspace: Using ICANN to Route around the APA and the Constitution*, 50 DUKE L.J. 17, 155-56 (2000) (“But while the Supreme Court has had no modern opportunities to revisit the private nondelegation doctrine, the state courts have had that chance, and their treatment of the issue underlines the importance of the doctrine today.”), Carl McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1128 (1977) (noting that the “nondelegation principle continues to have greater utility at the state level. . . .”); *Texas Boll Weevil*, 952 S.W.2d at 454 (overturning the Texas legislature’s delegation of legislative authority to the “Official Cotton Growers’ Boll Weevil Eradication Foundation,” a private non-profit entity, as an unconstitutionally broad delegation of legislative power to operate programs designed to eradicate the boll weevil, a pest that attacks cotton crops); *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868 (Tex. 2000) (holding that certain portions of the Texas Water Code were unconstitutional because they delegated certain legislative powers related to water quality to private landowners owning 1,000 acres or more); *Proctor*, 972 S.W.2d at 729 (upholding the delegation of power to consider appeals regarding suspensions and demotions to private arbitrators, pursuant to the Texas Civil Service Act, in lieu of appealing an action to the local civil service commission under Private Non-Delegation Doctrine principles); see also *Sedlack v. Dick*, 887 P.2d 1119, 1134-35 (Kan. 1995) (upholding a statutory challenge that permitted business and union officials to choose members of the Workers’ Compensation Board because the statute unconstitutionally delegated legislative authority to private parties); *City of Chamberlain v. R.E. Lien, Inc.*, 521 N.W.2d 130,132 (S.D. 1994) (invalidating under the South Dakota version of the Private Non-Delegation Doctrine that prohibits the

B. Judicial Reluctance and the Private Delegation of Public Power

Courts find delegations of public power to private actors more problematic than delegations to public authorities or agencies for several reasons. First, there is less opportunity to hold private actors that may be privately shielded and privately governed publicly accountable for the choices they make with the public power delegated to them.¹⁷ Second, this potential for unaccountable delegation of power may cause particular alarm for courts, given the inherent conflicts that may arise between the interest of the public and that of the private delegate, as well as the potential for abuse of the power by the private delegate. For instance, the Texas Supreme Court focused on the inherent divergence of interests between a private delegate of public power and the public that may unwittingly lead to an abusive of exercise of the power. It stated that private delegations, therefore, necessitate “more searching scrutiny” by the courts than when power is delegated solely to a public entity.¹⁸ In addition, the court has noted that delegations to private parties are more constitutionally “troubling” and “are subject to more stringent requirements and less judicial deference than public delegations.”¹⁹

Third, some scholars have stated that the underlying reason that delegation of public powers to private actors is more nettlesome to the judiciary is that there are some powers that are “essentially governmental.”²⁰ These public powers include “rulemaking,

state legislature from delegating “municipal functions” to any “special commission, private corporation or association” a state statute that required cities to include automatically the arbitration clause of the standard form contract of the American Institute of Architects in their municipal contracts).

17. See Froomkin, *supra* note 16, at 155 (“Several courts and commentators have agreed that delegations to private groups are more troubling than those to public agencies because the accountability mechanisms are weaker or non-existent.”).

18. See *Texas Boll Weevil*, 952 S.W.2d at 469 (“More fundamentally, the basic concept of democratic rule under a republican form of government is compromised when public powers are abandoned to those who are neither elected by the people, appointed by a public official or entity, nor employed by the government. Thus, we believe it axiomatic that courts should subject private delegations to a more searching scrutiny than their public counterparts.”); see also *id.* (citing George W. Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650, 659 (1975) (“Where a delegation by virtue of its content or breadth calls into question the future operation of the political process [by impinging on fundamental notions of representative democracy], judicial scrutiny seems warranted.”)). Similarly, in *Carter Coal*, the Supreme Court noted that private delegation is “legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interest of others in the same business.” 298 U.S. at 311.

19. *FM Props.*, 22 S.W.3d at 874.

20. Lawrence, *supra* note 4, at 648.

adjudication of rights, seizure of person or property, and licensing and taxation.”²¹ The common denominator between them, however, is the “element of coercion.”²² For instance, one who has these powers can force someone to do something that she does not wish to do; or conversely, that same entity can force an individual *not* to do something that she would like to do.²³

In contrast, power generally viewed as “private,” is centered squarely within the ability of an individual to consent to an action, and it is primarily found in contract law or in property ownership.²⁴ For example, a private property owner may bar or permit others from entering her real property by caprice alone, and she may subject this admission to certain rules of her making.²⁵ Moreover, by virtue of her being a real property owner, she may constrain the uses of real property in the surrounding area under nuisance law.²⁶ In addition, the law of contracts gives private parties the right to define rules and regulations amongst themselves.²⁷

Therefore, because of the coercive nature of public, or traditionally governmental power, exemplified by a lack of consent to an action or decision by an affected individual, governments choose generally to outsource or to privatize “ministerial or mechanical functions” and non-coercive responsibilities.²⁸ These services and functions frequently include the building of roads, waste collection, or the administration of health care where the risk of the interest of a private party colliding with that of the public is minimized.²⁹ When coercive power that is traditionally wielded by government is exercised by publicly unaccountable private parties that may have divergent interests from those of the public, increasing the likelihood of abuse by the private delegate, it is, therefore, quite understandable that courts will scrutinize that power much more closely.³⁰

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. Note, *The State Courts and Delegation of Public Authority to Private Groups*, 67 HARV. L. REV. 1398, 1399 (1954).

26. *Id.*

27. *Id.*

28. *Suss v. Am. Soc’y for the Prevention of Cruelty to Animals*, 823 F. Supp. 181, 189 (S.D.N.Y. 1993) (holding that a business owner had standing to sue after officers of the American Society for the Prevention of Cruelty to Animals, a private non-profit corporation delegated the authority by the New York legislature to enforce state laws protecting animals, broke through a wall without a warrant into the owner’s building to save a cat).

29. Freeman, *supra* note 2, at 552.

30. *Id.*

The judicial branch's concern about the delegation of public power to private parties, however, is much more than academic. Indeed, this concern has been borne out in the real world, as the way in which private delegates of public power have conducted themselves has proved historically "unsatisfactory."³¹

C. The Private Non-Delegation Doctrine's Nexus to Eminent Domain

Eminent domain has traditionally been explored through variations of the Takings clause that incorporate the Public Use and Just Compensation clauses of the U.S. constitution or its variations in many state constitutions. These passages speak directly to the principle of eminent domain or the coerced seizure of private property. For example, the Fifth Amendment of the federal constitution states that "Nor shall private property be taken for *public use*, without *just compensation*."³² Similarly, many state constitutions have equivalent provisions directly relating to eminent domain that require that seized land be used for a public use or a public purpose and that just, reasonable, or adequate compensation be rendered to a landowner.³³

31. See *id.* (citing *W. Browne*, *Altgeld of Illinois* ch. VIII-XIC (1924), and describing the conduct of private detectives who were deputized as police officers during the railway strike of 1984); see also *Washington v. Roberge*, 278 U.S. 116, 121-22 (1928) (striking down an amendment to a zoning ordinance that required a landowner who wanted to build a retirement center for low-income elderly residents to obtain the written consent of two-thirds of the landowners within 400 feet of the site because the consenting landowners "are not bound by any official duty but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee [the landowner desiring to build the home] to their will or caprice," thereby violating the Due Process Clause); *Jennings v. Exeter-West Greenwich Reg'l Sch. Dist. Comm.*, 352 A.2d 634 (R.I. 1976) (holding that a Rhode Island statute that required public school districts to bus schoolchildren residing within the district's boundaries to private schools unconstitutionally delegated legislative power to private schools, as they could establish how far a privately educated child could be bussed, regardless of whether the school was in the boundaries, and therefore how much the public school district would have to spend for these purposes); *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 950 P.2d 1086, 1110-11 (Cal. 1998) (Brown, J., dissenting) (writing that the Unfair Competition Law in California that gave ordinary citizens, not just public prosecutors, standing to sue delegated public authority to prosecute to private citizens, thereby holding potential defendants arbitrarily hostage to self-interested "unelected, unaccountable private enforcers, unrestrained by established notions of concrete harm or public duty, [who] seek to advance their own agendas or deploy the law as leverage to increase attorney fees").

32. U.S. CONST. art. V.

33. See, e.g., TEX. CONST. art. I, sec. 17 (Vernon 1997) (stating that "[n]o person's property shall be taken, damaged or destroyed for or applied to *public use* without *adequate compensation* being made.") (emphasis added) and MA. CONST. art. I, sec. 10 (noting that "[a]nd whenever the public exigencies require that the property of any individual should be appropriated to *public uses*, he shall receive a *reasonable compensation* therefor.") (emphasis added).

This Article contends that state versions of the Private Non-Delegation Doctrine may be an alternate legal and constitutional vehicle by which to explore the issue of eminent domain power that has been delegated to non-governmental actors, and in particular, to non-profit or charitable corporations.³⁴ In a post-*Kelo* world in which the Supreme Court has reaffirmed the expansion of the federal “public use” requirement to include private economic development that has a public purpose but also that benefits private non-governmental actors, the time may be especially ripe for a new analytical framework for eminent domain. This framework would assess the constitutionality of the very public eminent domain power wielded by non-governmental actors under state versions of the Private Non-Delegation Doctrine that is separate and apart from the traditional Takings clause, including Public Use and Just Compensation, analysis.

Therefore, although historically in state and constitutional jurisprudence the Private Non-Delegation Doctrine has involved the delegation of purely legislative authority to private parties,³⁵ the Doctrine refers specifically to the delegation of the takings power *by* the legislature *to* private parties in the eminent domain context.³⁶ Historically, delegation of eminent domain power to common carriers, such as private railroad companies and private companies that operate public utilities, has been upheld by courts. For instance,

34. See, e.g., *Texas Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 493 (Tex. 1994) (Cornyn, J., concurring in part and dissenting in part) (noting that in response to the Texas Supreme Court’s decision to strike down a delegation of legislative power to a private non-profit, deeming it unconstitutional pursuant to a eight-step inquiry, that the court failed to “consider the impact of its decision on the [Texas] Legislature’s common practice of delegating eminent domain powers to private entities”); see also *FM Properties Operating Co. v. City of Austin*, 22 S.W.3d 868, 899 (Tex. 2000) (Abbott, J., dissenting) (making a similar case in answer to the Texas Supreme Court’s holding that the Texas legislature had unconstitutionally delegated power to private landowners to create water quality zones and questioning how the court could “reconcile” its holding with “existing legislative grants of eminent domain power to private entities”).

35. See *supra* note 14 and accompanying text.

36. See Benjamin McCorkle, *Constitutional Law—Arkansas’s Nondelegation Doctrine: The Arkansas Supreme Court Defines a Limit on the Delegation of Legislation Authority to a Private Party*, *Leathers v. Gulf Rice Arkansas, Inc.*, 338 Ark. 425, 884 S.W.2d 481 (1999), 23 U. ARK. LITTLE ROCK L. REV. 297, 299 (2000) (“The nondelegation doctrine is the judicial interpretation of what authority a legislative body can delegate to another branch of government, administrative agencies, or non-governmental entities.”); see also 2006 Eminent Domain Made Easy, Office of the Attorney General of Texas, p.3, www.oag.state.tx.us/AGPublications/pdfs/2006eminentdomaineasy.pdf (last visited Jan. 4, 2007) (noting that “[t]he power of eminent domain is delegated by statutory provision to state agencies, political subdivisions, and to certain private entities.”)).

the Supreme Court noted in *Luxton v. North River Bridge Company* that it is “beyond dispute” that Congress could constitutionally delegate the takings power to private, for-profit companies such as private railroad corporations.³⁷ While grounding its holding in the Necessary and Proper and the Commerce clauses of the U.S. Constitution, to state that Congress could transfer to a corporation the power of eminent domain to construct a rail bridge traversing a body of water between two states, the Court’s analysis could have easily fit within federal private non-delegation principles. Rail companies build railroads and bridges as part of the profit-making motive of their business, but also to help the public transport goods that drives the economy. Hence, the profit-making interest of rail companies is almost inextricably linked with that of the public. Consequently, the risk of abuse of the power by rail companies against the public is comparably low, since their interests are generally intertwined with those of the public. As a result, some commentators have noted that, given the impact that railroad and public utilities have on the national economy, these private, for-profit companies should exercise eminent domain, as they are more efficient and save state and federal governments “time and money.”³⁸

Furthermore, just as the interests between common carriers and the public are theoretically minimized, they are also generally held to account by publicly accountable state agencies for the takings choices that they make. For example, public utility companies are generally highly regulated, and although private, for-profit companies, they have an “inherent public nature.”³⁹ In Texas, for instance, public utilities generally have the power of eminent domain, but regulation that holds them accountable to publicly accountable agencies and officials and that minimizes conflicts of interest between the utility and the public rules the roost. This regulatory scheme polices the

37. 153 U.S. 525, 529 (1894); see *Kelo v. City of New London*, 125 S. Ct. 2655, 2673 (2005) (O’Connor, J., dissenting) (explaining that one of the three categories in which the government may transfer private property to private entities is in the case of common carriers, such as railroad companies and utility companies that will make the property available for public use.)

38. See Lawrence, *supra* note 4, at 657 (“Similarly, allowing private enterprises such as railroads to directly exercise the power of eminent domain, saves the government time and money.”).

39. See Chris Reeder, *Regulation by Contractors: Delegation of Legislative Power to Private Entities in Texas*, 5 TEX. TECH. J. TEX. ADMIN. L. 191, 229 (2004) (noting as an example of the public and highly regulated nature of the public utilities industry, in contrast to other private industry, that they are bound to serving any customer who qualifies for service in a non-discriminatory manner, including being non-discriminatory in their rates).

rates that are charged to customers, the acquisition of licenses and franchises from state regulatory agencies and from cities, respectively, and mandates that facilities be operated only after a state agency has given its approval.⁴⁰ Also, with respect to an exercise of eminent domain, Texas requires that a public utility may not run facilities on seized land unless a state agency has approved the operation.⁴¹ Finally, the state agency's approval is based on a need for the utility.⁴²

II. ARGUMENTS FAVORING AND DISFAVORING THE DELEGATION OF THE TAKINGS POWER TO PRIVATE, NON-PROFIT CORPORATIONS

A. *Why Delegate Eminent Domain Power to Private, Non-Profit Corporations?*

As with the Public Non-Delegation Doctrine, there are a number of arguments in support of delegating the takings power to private, non-profit corporations. An obvious argument is that delegating this power to private, non-profit corporations is more efficient. Government, and therefore, taxpayers, are spared the time and expense of having to negotiate, seize, and purchase property under eminent domain, especially from recalcitrant landowners who may be opposed to the action.⁴³ Instead, these costs are passed on to the private, non-profit corporation, and taxpayers, therefore, save money. For instance, in order to decrease the financial burden on taxpayers, a number of judges and courts use private arbitration mechanisms in lieu of appointing public judges to hear the same cases.⁴⁴

Moreover, government tends to be bureaucratic, and corporations more supple.⁴⁵ In the amount of time that it may take local government to seize property on behalf of a private, non-profit corporation, that same non-profit, by virtue of its non-bureaucratic nature, may have "moved on," taking and investing with it much-needed dollars in another community.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* Indeed, some judges and courts have supported private delegation because it favors more "privatization" and less government "regulation" or interference. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 899 (Tex. 2000) (Abbot, J., dissenting).

44. *FM Props.*, 22 S.W.3d at 899.

45. Lawrence, *supra* note 4, at 655.

Furthermore, *political* efficiency may also warrant the delegation of eminent domain power to private, non-profit corporations. When government decides to use its takings power, interest groups opposed to the action may utilize the political process to delay or to halt the taking. The reaction by the several homeowners in *Kelo* who were opposed to the taking of their homes by the New London Development Corporation is a perfect example of this situation. Not only did the economic development plan envisioned by the city of New London experience significant delay,⁴⁶ but also the homeowners' actions sparked a nationwide outcry against the use of the takings power for economic development.⁴⁷ Similarly, in *Poletown*

46. William Yardley, *After Eminent Domain Victory, Disputed Project Goes Nowhere*, N.Y. TIMES, Nov. 21, 2005, at A1. In June 2006, however, New London voted, in opposition to the stance taken by Connecticut's governor to evict the remaining hold-outs in Fort Trumbull. See Avi Salzman, *Connecticut City Takes First Step to Evict Eminent Domain Case*, N.Y. TIMES, June 6, 2006, at B2. Furthermore, in July 2006, the city's Planning and Zoning Commission granted building permits for the economic development project to begin. See Elaine Stoll, *Commission Approves Hotel Suite Plan For Fort Trumbull*, THE DAY, July 22, 2006, at 2B.

47. See Judy Coleman, *The Powers of a Few, the Anger of the Many*, WASH. POST, Oct. 9, 2005, at B2; see also Timothy Egan, *Rulings Sets Off Tug of War Over Private Property*, N.Y. TIMES, July 30, 2005, at A12. Furthermore, at last count, approximately forty-one states had introduced legislation to limit the use of eminent domain for private economic development in response to *Kelo*. See John M. Broder, *States Curbing Right to Seize Private Homes*, N.Y. TIMES, Feb. 21, 2006, at A1. For instance, in California alone, five constitutional amendments and eight proposed pieces of legislation have been put before the California Legislature to counter the Court's decision in *Kelo*. In Texas, the legislature acted swiftly and banned the use of eminent domain on behalf of a private party, except for certain uses. Among these exceptions is the taking of land for a new stadium for the Dallas Cowboys football team. In addition, in Ohio, the legislature placed a one-year moratorium on all takings soon after the *Kelo* ruling. See *id.*; see also Dennis Cauchon, *States Eye Land Seizure Limits*, USA TODAY, Feb. 20, 2006, at 1A (noting the one-year moratorium in Ohio). See generally Terry Pristin, *Developers Can't Imagine a World Without Eminent Domain*, N.Y. TIMES, Jan. 18, 2006, at C5 (discussing different measures that states have taken in response to *Kelo* and noting the opposition to the legislative groundswell from developers, some lawmakers, and the real estate community). With respect to action taken on the federal level, as of November 30, 2005, legislation was passed by Congress and signed into law by the President that makes appropriations for certain government agencies and provides that no funds shall be used for federal, state, or local projects that seek to use the power of eminent domain for economic development that would primarily benefit private parties. See Transportation, Treasury, and Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006, Pub. L. No. 109-115, § 726, 119 Stat. 2396, 2494-95 (2005). Furthermore, the U.S. House of Representatives recently passed H.R. 4128, a bill that proposes to prevent states and their political subdivisions from receiving federal economic development funds for two years if a court of competent jurisdiction rules that eminent domain has been used for economic development. Private Property Rights Protection Act of 2005, H.R. 4128, 109th Cong. § 2(b) (2005). The same legislation also allows not only for individuals to sue local or federal government to enforce any provision of the proposed law, but also for the awarding of attorney's fees should a plaintiff prevail. *Id.* § 4(a), (c). It also prevents the federal government from using eminent domain for economic development. *Id.* § 3. The proposed law

Neighborhood Council v. City of Detroit,⁴⁸ the residents of the Poletown neighborhood made national headlines by using the political process to protest General Motors (“GM”) and the city of Detroit for seizing their land for the construction of a Cadillac manufacturing plant. The residents achieved a temporary victory in delaying the “quick-take” project, but they were ultimately powerless to stop the takings.⁴⁹

Therefore, much as members of Congress may relish delegating power to federal agencies because the agencies “take the heat” for unpopular decisions with the electorate and these representatives may “look good” before their constituents when opposing those decisions,⁵⁰ state legislators may often welcome the delegation of the takings power to non-profits. Legislators are ultimately removed from political and electoral accountability, yet, by virtue of the delegation, may simultaneously and indirectly bestow benefits onto powerful non-profit corporations in exchange for financial support that keeps them in office.

Yet another powerful reason that legislatures may delegate the power of eminent domain is that, as with all delegations, there is nothing in many state constitutions and in the federal Constitution that expressly forbids the general delegation of legislative power to other entities, private or public, or to other branches of

broadly defines economic development as, “taking private property, without the consent of the owner, and conveying or leasing such property from one private person or entity to another private person or entity for commercial enterprise carried on for profit, or to increase tax revenue, tax base, employment, or general economic health. . . .” *Id.* § 8(1). As of the writing of this Article, however, the U.S. Senate has not acted on this measure. In general, however, although new legislation to protect private property owners from economic development takings is still being introduced the legislative momentum spurred by the Supreme Court’s decision in *Kelo* seems to have slowed tremendously almost a year after the decision.

48. 304 N.W.2d 455 (Mich. 1981) (upholding a Michigan quick-take statute that allowed the city of Detroit to take land in the Poletown neighborhood and to transfer it to General Motors for the construction of a Cadillac auto plant because the public benefits promised by the plant were substantial).

49. The residents opposed to the project in the Poletown neighborhood formed the Poletown Neighborhood Council. See Gallagher, *supra* note 10, at 1868. For an excellent history of the *Poletown* case, see generally BRYAN D. JONES & LYNN W. BACHELOR, *THE SUSTAINING HAND* (1986).

50. See THEODORE LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 92-3, 298-99 (1969) (“As Kenneth Davis puts it, Congress in effect says, ‘Here is the problem: deal with it.’”); *id.* (“A delegation of power to the president or to agencies is in reality a delegation of personal responsibility [by Congress]. . . .”).

government.⁵¹ In effect, there is generally no Private or Public Non-Delegation Doctrine written into many state constitutions.⁵²

A final reason to support the notion that the private delegation of power to non-profits is not problematic is that legislatures in delegating this power should be given deference in the decisions they make. For instance, the U.S. Supreme Court has supported deferring to the decisions of state legislatures in the eminent domain context. In *Kelo*, the Court recently underscored the “great respect” that it held for state legislatures’ assessments and determinations of “local needs.”⁵³ Finally, with respect specifically to the delegation of public power to private entities, some commentators have noted that such a choice can be “reasonable and therefore deserves the judicial respect given any reasonable legislative policy choice.”⁵⁴

B. Arguments In Support of Restricting Delegation of Eminent Domain Power to Private, Non-Profit Corporations

The right to seize property is a traditional government power that, like most similar government powers such as the power to arrest someone, to tax, and to license, is coercive in nature.⁵⁵ The sovereign may force an individual to do or not to do something against his or her will.⁵⁶ When this coercive power of seizure of property is delegated to private non-profits, indeed to any private party, there is undoubtedly created an opportunity for these parties to seize property for themselves at the expense of the public, creating the potential for abuses of power. This potential for abuse of power stems from the conflicting interests of the private delegate and the public which is at the heart of the Private Non-Delegation Doctrine. The private delegate may act in its own interests instead of in the public’s interest and to the general detriment of the public or to an

51. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000).

52. *See id.* at 331 (expressing the belief that the Constitution includes a Non-Delegation Doctrine, but that there is no “*express* nondelegation doctrine in the text”) (emphasis added).

53. *Kelo v. City of New London*, 125 S. Ct. 2655, 2664 (2005). In addition, at the state level, some courts have noted that the legislative branch has the sole power to “invest” certain entities at its choosing, public or private, with eminent domain power. *See, e.g.,* *Annbar Assocs. v. W. Side Redevelopment Corp.*, 397 S.W.2d 635, 647 (Mo. 1965). Furthermore, in *Berman v. Parker*, 348 U.S. 26, 32 (1954), the Court stated that “. . . when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases, the legislature, not the judiciary, is the main guardian of the public needs to be served.”

54. Lawrence, *supra* note 4, at 651.

55. *See supra* notes 5, 20-293 and accompanying text.

56. *Id.*

individual.⁵⁷ This opportunity for “self-interested”⁵⁸ action is a result of a classic conflict-of-interest scenario.

The delegation of public power, such as eminent domain, to private parties may be contrasted with similar delegations to government agencies. However, unlike private parties, agencies are often headed by appointees of the head of the executive branch and confirmed by the legislature, or are directly elected in some states.⁵⁹ In addition, officers must generally take an oath of office promising that they will uphold the laws of the land, not their self-interest.⁶⁰ Furthermore, there is often the weight of the public purse and the prospect of a cut in funding to a particular agency by the legislature that keeps an agency accountable, should the agency be mismanaged and act in ways that benefit certain parties and not the public.⁶¹ In contrast, delegating the power to seize property to private actors that may be unaccountable to the electorate, given the conflicting interests of the public and the private delegate, may not satisfy the state constitutional demands of the Private Non-Delegation Doctrine.

In essence, there is an expectation that a public official with coercive governmental powers in hand will act in a “disinterested” way and not allow self-interest to guide his or her decision-making.⁶² When this expectation is not satisfied in the public’s opinion, then the electorate “may vote the [public] rascals out.”⁶³ The public is, therefore, utilizing the ultimate mechanism of democracy, the voting booth, to account for the government’s substantive choices and the way that it chooses to exercise its power.

Depending on the enabling legislation granting the private delegation of a public power, such as the abusive exercise of the takings power that has been delegated to a private, non-profit, no similar “accountability mechanisms”⁶⁴ or statutory checks may exist to

57. See Lawrence, *supra* note 4, at 659 (noting that “[t]he concern is that governmental power—power coercive in nature—will be used to further the private interests of the private actor, as opposed to some different public interest.”); see also Froomkin, *supra* note 16, at 153-54 (discussing that “. . .the Carter Coal doctrine forbidding delegation of public power to private groups is, in fact, rooted in a prohibition against self-interested regulation. . .”).

58. Lawrence, *supra* note 4, at 660.

59. See Reeder, *supra* note 39, at 218, 226 (discussing the accountability measures on public agencies in Texas).

60. *Id.* at 218.

61. *Id.*

62. *Id.*

63. Lawrence, *supra* note 4, at 660.

64. Froomkin, *supra* note 16, at 29-30.

deal with these “private rascals.”⁶⁵ It is this unchecked lack of accountability that may fuel opportunities for private, non-profit corporations to self-aggrandize in contravention of a state’s Private Non-Delegation Doctrine. It is also this potential for self-aggrandizement at the expense of the public in private delegations of public power that spurred the Texas Supreme Court to describe the private non-profit association in the *Texas Boll Weevil* case as “[l]ittle more than a posse: volunteers and private entities neither elected nor appointed, privately organized and supported by the majority of some small group, backed by law but without guidelines or supervision, wielding great power over people’s lives and property but answering virtually to no one.”⁶⁶

Therefore, although the delegation of eminent domain power to private, non-profit entities with little or no public accountability controls may be more time and cost-efficient, as well as more politically efficient and expedient, practically they may spur an abusive exercise of the public power. Constitutionally, the delegations may run afoul of a state’s Private Non-Delegation Doctrine. Moreover, the mere threat of a private, non-profit corporation’s having eminent domain power, regardless of whether or not it actually uses it to seize private property, is reason enough to support statutory accountability controls that mitigate the conflicts of interest and potential for abuse by the private delegate. It is likely that this mere threat is intimidating, especially to unsophisticated homeowners and small business owners who are unfamiliar with eminent domain and who may be scared into selling their real property at below-market prices at the first mention of “eminent domain” by a powerful private non-profit institution.

Finally, one of the strongest arguments in support of statutory accountability controls on the delegation of the takings power to private, non-profit corporations that mitigate conflicts of interest and the potential for abuse of power is that when government or a quasi-governmental organization chooses to exercise this power, it is often, at the very least, after intense public discussion and public hearings that provide for a significant amount of public input. The effect of these public conversations is often to compel government to consider alternative points of view that may conceivably force a re-thinking or

65. *Id.*

66. *Texas Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 479 (Tex. 1994) (Hecht, J., concurring in part and dissenting in part).

the abandonment of its use.⁶⁷ Should these public discussions result in outcomes that the public deems unfavorable, it has the opportunity to hold elected officials who make up government in part accountable for their decisions on Election Day.⁶⁸ Consequently, when government and even public agencies are expected (1) to hold public hearings, (2) are subject to being voted out of office, and (3) are expected to abide by the minimum federal constitutional requirements of “just compensation” and “public use,” and any additional state constitutional requirements, it is no more than logical that private entities empowered with government-like powers to coerce the seizure of private property should be subject, at a minimum, to equivalent or to stricter requirements.

C. A Per Se Rule Against the Delegation of Eminent Domain Power to Private, Non-Profit and Charitable Corporations?

Given the reasons outlined in Part II.B of this Article in support of restrictions on private actor delegates in the takings context, the question arises as to whether or not there should be a *per se* rule prohibiting delegations of the takings power to private, non-profit and charitable corporations. Indeed, this line of reasoning is strengthened, as these private actors may have significant political and economic power that may bind them inextricably to elected officials and allow them to influence officials to a large degree.

Despite the persuasive arguments in favor of a *per se* abolishment of private delegations of the takings power, this Article takes a more pragmatic approach to them. As noted in Part IV.A of this Article with respect to the Texas Medical Center case study, the economic impact of some private, non-profit corporations delegated the takings power on local communities is immense. This economic impact,

67. See, e.g., Rad Sallee, *Metro Schedules Three Public Hearings on New Rail Line*, HOUS. CHRON., July 14, 2006, at B7 (reporting that Houston, Texas' public transport authority, or METRO, that has eminent domain power, has scheduled a series of public hearings regarding its proposed expansion of commuter rail in neighborhoods and that contemplates the use of eminent domain).

68. See, e.g., Wendy Hudley, *Allison Says Voters Wanted Change: He Credits Opposition to Underpass as Key to Council Victory*, THE DALLAS MORNING NEWS, June 16, 2005, at 1S (discussing the ousting of an incumbent from the Richardson, Texas, City Council, the first in sixteen years, who had supported the use of eminent domain); Clay Barbour, *Eminent Domain's Electoral Fallout, Elected Officials Face Widespread Opposition and Voter Wrath*, ST. LOUIS POST, Mar. 31, 2006, at C1; Lisa Smith, *St. Charles Voters Hand Mayor's Job to De Witte, Klinkhamer's Eight-year Tenure Ends Following Bitter Campaign*, DAILY HERALD, Apr. 6, 2005, at 1 (noting that now ex-mayor Klinkhamer had approved condemnation of property for a redevelopment project the year before, without involving the public).

whether on an entire city, as in the Texas Medical Center case study in Houston, or on an entire neighborhood, as in the Dudley Neighbors, Inc. case study in Boston, is a double-edged sword to local communities.⁶⁹ Essentially, in exchange for this economic impact and the significant “run-off” effects onto the local community, there is an argument that it may be reasonable to afford these entities the takings power, albeit not without accountability controls that would minimize the potential for abuses of an exercise of eminent domain as a result of the conflicting interests between the private delegate and the public.

Moreover, the Dudley Neighbors, Inc. case study in Boston evidences that statutory mechanisms that ultimately minimize the abuses of power that may result from the conflicts in interest of a private, non-profit delegate of eminent domain power may satisfy the constitutional demands of a state’s private non-delegation norm.⁷⁰ In addition, there is the further argument that, to a certain extent, local communities should be able to decide how much of the takings power and by what strictures they are willing to delegate to a private non-profit corporation.

Allowing room for the delegation of the takings power to these private actors, however, does not otherwise diminish the argument that there need be suitable statutory controls in place that would satisfy the demands of a state’s private non-delegation doctrine, ensuring that the rights of all affected individuals are respected.⁷¹

III. THE TEXAS BOLL WEEVIL TEST

A. Description

In its 1997 *Texas Boll Weevil* decision, the Texas Supreme Court struck down the creation and delegation of power to the private, non-profit Texas Boll Weevil Eradication Foundation by the Texas legislature as unconstitutional under the Texas Private Non-Delegation Doctrine.⁷² The legislature had created the Foundation in order to eradicate the boll weevil insect, a pest that attacks cotton crops and results in significant economic damage to cotton producers.⁷³ In the decision, the court outlined a preliminary three-

69. See *infra* Parts IV.A & B.

70. See *infra* Part IV.B.

71. See *infra* Part V regarding recommendations for statutory safeguards.

72. See *supra* note 196 and accompanying text.

73. *Id.*

part inquiry to use in determining the constitutionality of a private delegation.⁷⁴ This initial three-part test involves: (1) determining whether or not the powers delegated to an entity are legislative or law-making,⁷⁵ pursuant to separation of powers analysis,⁷⁶ that dictates that any power deemed legislative must stay in the legislative branch; (2) assessing whether or not the delegate is private or public;⁷⁷ and (3) if the delegation inquiry survives the previous two parts, analyzing the constitutionality of a delegation under an additional eight-part test. This eight-part test has been distilled from the scholarly work of several well-known academics in the non-delegation field, such as Professors Jaffe, Liebmann, Davis, and Lawrence.⁷⁸ The *Texas Boll Weevil* court, however, made it clear that the eight-part test was strictly for private delegations,⁷⁹ noting that it was required to give “more searching scrutiny” to these delegations.⁸⁰

The constitutional analysis in *Texas Boll Weevil* initially focuses on whether or not there has been an impermissible delegation of legislative power, power that is supposed to lie in the legislative branch under the Texas Constitution.⁸¹ Despite the initial three-part

74. See Reeder, *supra* note 39, at 213 (describing the initial three-part *Texas Boll Weevil* test).

75. *Texas Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 475 (Tex. 1994).

76. *Id.*

77. See Reeder, *supra* note 39, at 213; see also *Texas Boll Weevil*, 952 S.W.2d at 470 (“We first address whether the Foundation is a public or private entity for purposes of the nondelegation doctrine.”).

78. Professor Jaffe is the author of the seminal law review article, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937); see Jaffe, *supra* note 5. Professor Liebmann wrote *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650 (1975); see Froomkin, *supra* note 16, at 155. Professor Davis authored the first edition and a 1970 Supplement to an administrative law treatise that has been heavily referred to in delegation circles entitled, K. DAVIS, ADMINISTRATIVE LAW TREATISE (2d ed. 1978). Professor Lawrence’s work is cited throughout this Article. See Lawrence, *supra* note 4.

79. *Texas Boll Weevil*, 952 S.W.2d at 472.

80. *Id.* at 469; see also *supra* notes 19-20.

81. This part of the *Texas Boll Weevil* inquiry concerns the state constitutional source of the Private Non-Delegation Doctrine. See *supra* note 154 and accompanying text. For instance, Article II, § 1 of the Texas Constitution, the constitutional provision that mandates separation of powers, states that “[t]he powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.” TEX. CONST. art. II, § 1. On the other hand, Article III, § 1 of the Texas Constitution notes explicitly that “[t]he Legislative power of this State shall be vested in a Senate and House of Representatives, which together shall be styled ‘The Legislature of the State of Texas.’” TEX. CONST. art. III, § 1; see also *infra* notes 97-100.

inquiry, the heart of the *Texas Boll Weevil* analysis is the following eight-part test:

- (1) Are the private delegate's actions subject to meaningful review by a state agency or other branch of state government?;
- (2) Are the persons affected by the private delegate's actions adequately represented in the decision making process?;
- (3) Is the private delegate's power limited to making rules, or does the delegate also apply the law to particular individuals?;
- (4) Does the private delegate have a pecuniary or other personal interest that may conflict with his or her public function?;
- (5) Is the private delegate empowered to define criminal acts or impose criminal sanctions?;
- (6) Is the delegation narrow in duration, extent, and subject matter?;
- (7) Does the private delegate possess special qualifications or training for the task delegated to it?; and
- (8) Has the Legislature provided sufficient standards to guide the private delegate in its work?⁸²

In elucidating this eight-part test, the Texas court further provided several indications as to how the eight factors should be weighed. For instance, the *Texas Boll Weevil* court noted that, in order for a private delegation to be an overly broad delegation of legislative power under the provision of the Texas constitution that vests lawmaking power solely in the legislature, a "majority of the factors" must be violated.⁸³ In addition, the court noted that the legislation at issue, the Texas Boll Weevil Act, was to be constitutionally reviewed "as a whole."⁸⁴ Nonetheless, the court signaled a cautionary note in its application of the *Texas Boll Weevil* test, stating that it was to be applied "sparingly"⁸⁵ when private delegation was "running riot."⁸⁶ Moreover, the court definitively stated that a private delegation did not have to comply with all eight factors in order to pass constitutional muster under the Texas constitution—it just needed to satisfy a majority of them.⁸⁷

82. *Texas Boll Weevil*, 952 S.W.2d at 472.

83. *Id.* at 475.

84. *Id.*

85. *Id.*

86. *Id.* (citing Justice Cardozo in *A.L.A. Schechter Poultry Corp.*, 295 U.S. 495, 553 (1935)).

87. *Id.*

*B. Subsequent Glosses on the Texas Boll Weevil Test**1. Proctor v. Andrews*⁸⁸

In 1998, one year after the Texas Supreme Court identified the eight-part *Texas Boll Weevil* test, the court further clarified it in *Proctor v. Andrews*. *Proctor* called into question the constitutionality of Texas' Civil Service Act,⁸⁹ a statute that provided firefighters and police officers means to appeal decisions made by their superiors in which they were suspended, passed over for promotion, or demoted. The officer or firefighter could appeal either to the local civil service commission or to an independent third party.⁹⁰ If the officer were to choose the latter route, the city was required to request seven qualified neutral arbitrators from either the American Arbitration Association ("AAA") or the Federal Mediation and Conciliation Service ("FMCS").⁹¹ Under the statute, a municipality was required to strike the names of those arbitrators that it would not choose to conduct the hearings.⁹² Unless the decision of this arbitrator was unlawful, the decisions were final, and the officer or firefighter effectively waived his right to appeal the decision to the district court.⁹³ In *Proctor*, three cases were consolidated in which the city of Lubbock had failed to request seven arbitrators or to strike arbitrators pursuant to the statute.⁹⁴ *Proctor* filed suit seeking a declaratory injunction compelling Lubbock's compliance, and the city counter-sued contending that the Civil Service Act was unconstitutional.⁹⁵

The *Proctor* court held that the Texas legislature had not acted unconstitutionally in delegating the power to arbitrate grievances of civil service personnel to private parties under Texas's Civil Service Act.⁹⁶ The court first stated that the case involved a delegation of power to a private actor,⁹⁷ and it essentially declined to conduct the

88. 972 S.W.2d 729 (Tex. 1998).

89. TEX. LOC. GOV'T CODE ANN. § 143.001.

90. *Proctor*, 972 S.W.2d at 732.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *See id.* at 733 ("Because the delegates in the instant case are not affiliated with any department of the state government. . . .").

private versus public actor analysis in the second part of the initial three-part inquiry that it embraced in *Texas Boll Weevil*.⁹⁸

Secondly, the court explained that when an unquestionably private actor is the recipient of a delegation, then the constitutional source of the Private Non-Delegation Doctrine derives from Article III, Section 1 of the Texas Constitution that vests legislative power solely in the legislative branch.⁹⁹ In contrast, the *Texas Boll Weevil* court held that the test sounded in the separation of powers provisions found in Art. II, Section 1 of the Texas Constitution.¹⁰⁰ Another gloss on the *Texas Boll Weevil* test that the *Proctor* court provided was to state that, even with the eight-part *Texas Boll Weevil* test, it would interpret delegations in the most constitutional light possible.¹⁰¹

2. FM Properties Operating Co. v. City of Austin¹⁰²

Subsequently, in 2000, the Texas Supreme Court decided *FM Properties*, a case in which the city of Austin sought a declaratory injunction against private landowners who owned more than 500 acres of land, from designating “water quality and protection zones” within Austin’s extraterritorial jurisdictions.¹⁰³ The city contended that section 26.179 of the Texas Water Code,¹⁰⁴ that allowed landowners to designate certain water zones as “protected,” was an unconstitutional delegation of power under Texas’ Private Non-Delegation Doctrine. The city also provided the following five reasons to support its arguments that the pertinent section of the Water Code was unconstitutional: (1) the provision unconstitutionally delegated legislative powers to private landowners; (2) it targeted the city of Austin; (3) the statute infringed on the city’s home rule powers conferred by the Texas Constitution; (4) it violated the city’s property rights; and (5) the statute allowed private property

98. *Texas Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 472 (Tex. 1994).

99. Nonetheless, the court also stated that the *Texas Boll Weevil* test could be applied to delegations of legislative authority derived from the separations of powers language in Article III, Section 1 of the Texas constitution. See *Proctor*, 972 S.W.2d at 735.

100. *Texas Boll Weevil*, 952 S.W.2d at 472.

101. See *Proctor*, 972 S.W.2d at 735 (“Thus, we consider all eight factors, keeping in mind that if it is possible to interpret the language of the statute in a manner that renders it constitutional, we must do so.” (citing *Nootsie, Ltd. v. Williamson Co. Appraisal Dist.*, 925 S.W.2d 659, 662) (Tex. 1996))).

102. 22 S.W.3d 868 (Tex. 2000).

103. *Id.* at 872.

104. TEX. WATER CODE ANN. § 26.179.

owners to suspend the laws.¹⁰⁵ The court struck down the statutory delegation by the Texas legislature of power to private landowners to create water quality zones as unconstitutional under the Private Non-Delegation Doctrine.¹⁰⁶

In addition, the Texas Supreme Court in *FM Properties* provided further clarification on the weight of each the eight factors in the *Texas Boll Weevil* test. For instance, the court stated that the weight of the factors was to be determined on a case-by-case basis, according to each individual set of facts.¹⁰⁷ Still, it generally noted that when it came to private delegations of legislative power, two factors in the *Texas Boll Weevil* test would be most “heavily” weighted in analyzing whether or not a particular private delegation was violative of the Private Non-Delegation Doctrine because they address the “central concerns” of the Doctrine.¹⁰⁸ These “central concerns” are: (1) whether or not “the private delegate’s actions are subject to meaningful review by a state agency or other branch of state government;” and (2) whether or not the “private actor has a pecuniary or other personal interest that may conflict with his or her public function.”¹⁰⁹ Essentially, these central concerns refer to whether or not sufficient accountability mechanisms exist in the enabling legislation of the delegation to mitigate the conflicting interests of a private delegate and the public and the potential for abusive exercise of the delegated power by the private party.

For instance, one of the “heavily” weighted factors identified by the court in *FM Properties* focuses on whether or not there is “meaningful government review,” either by a state agency or other part of government or a private delegate’s actions.¹¹⁰ The requirement of “meaningful government review” goes to one of the most potent and central ways in a democracy in which private delegates of power may be held accountable for ostensibly “public” actions—directly or

105. *FM Properties Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000).

106. *Id.* at 868.

107. *See id.* at 875 (“*Boll Weevil* does not specify if any factors weigh more heavily than others, but the importance of each factor will necessarily differ in each case,” and noting that the inquiry in *Texas Boll Weevil* places heavy emphasis on the first factor of the eight-part inquiry, or whether there is meaningful government review of a private delegate’s action).

108. *Id.*

109. *Id.*

110. *Texas Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 472 (Tex. 1994).

indirectly holding elected officials responsible for choices made by private delegates.

In addition, the other “heavily” weighted factor in the *Texas Boll Weevil* test subsequently emphasized by the Texas Supreme Court in *FM Properties* examines the financial or personal interest that a private actor might have in exercising delegated authority to it. This factor, therefore, allowed the court to concentrate on the inherently self-interested opportunities that arise for private delegates of public power.

Finally, in *FM Properties*, the Texas court further refined the definition of legislative power, at issue in the initial three-part *Texas Boll Weevil* inquiry.¹¹¹ The court stated in *FM Properties* that legislative power is generally the power “to make rules and determine public policy,” while including “many administrative aspects, including the power to provide the details of the law, to promulgate rules and regulations to apply the law, and to ascertain conditions upon which existing laws may operate.”¹¹²

C. *The Texas Boll Weevil Test Under Scrutiny*

The eight-part *Texas Boll Weevil* test has been criticized by some commentators as too vague and subjective.¹¹³ Indeed, although the Texas Supreme Court stated that a private delegation must pass muster under a majority of the eight factors to be nonviolative of the state constitution, it is unclear exactly how many factors constitute a majority. It is also unclear how much each factor should be weighted. For example, the delegation analysis by the court in *Texas Boll Weevil* resulted in the delegation’s “failing” five of the factors, “passing” one factor, and being “inconclusive” or neutral in two others.¹¹⁴ In contrast, in *Proctor*, the delegation “passed” all factors, except for one.¹¹⁵ Highlighting the subjective nature of the eight-part case-by-case inquiry, the Texas Supreme Court in *Proctor* disagreed with the

111. *Id.* at 465.

112. *FM Props.*, 22 S.W.3d at 873.

113. See Reeder, *supra* note 39, at 222-23 (asserting that the test gives little “guidance” to lower courts, legislators, and private parties because of its “vagueness” and that it “simply describes a subjective analysis”).

114. See *Texas Boll Weevil*, 952 S.W.2d at 473-75 (explaining and providing analysis that the first, third, fourth, seventh, and eighth factors “weighed against” the delegation, the second factor weighed in favor of it, and the fifth and sixth factors were neutral).

115. See *Proctor v. Andrews*, 972 S.W.2d 729, 735-38 (Tex. 1998) (providing a numerical tally of the analysis of the factors, in which the delegation passed all factors except for the first factor in the *Texas Boll Weevil* inquiry, and providing reasons for the analytical result).

state court of appeals' weighing of whether or not "the Legislature had provided sufficient standards to guide the private delegate in its work, as against the delegation."¹¹⁶

Similarly, in *FM Properties*, in which the Texas Supreme Court stated that it would weigh more "heavily" (1) the availability of meaningful review by the government and (2) the private delegate's interests in contrast to other factors of the *Texas Boll Weevil* test, the court in a numerical breakdown determined that four factors of the eight-part *Texas Boll Weevil* test weighed against the delegation.¹¹⁷ Two of these four factors weighed "heavily" against the constitutionality of the delegation.¹¹⁸ On the other hand, the court stated the private delegation passed muster under two of the factors and was neutral with respect to two other parts of the test. Thus, the numerical tally, that permitted the court to strike down the private delegation in *FM Properties* under the Texas version of the Private Non-Delegation Doctrine, was four against (two heavily), two in favor, and two neutral.¹¹⁹

Indeed, with the wide mix of numerical scenarios that has resulted in the application of the *Texas Boll Weevil* test in only three cases involving private delegations of public power, there are conceivably a limitless number of numerical possibilities and weighted outcomes, yielding a wide band of subjectivity and making the test "susceptible to nuance."¹²⁰ Questions, therefore, abound. As one commentator has noted:

What would be the "right" mix of factors and heavily weighted factors that would warrant upholding a private delegation? What if the enactment narrowly fails five factors, but passes the other three by a wide margin? Could a particular act fail a particular factor in such an appalling and offensive way that it requires invalidating the delegation, even if it passes all other factors? Should the courts simply count all factors as equal, or perform a weighted average balancing test? How should courts account for neutral factors?¹²¹

116. See *id.* at 737-38 (highlighting the eighth factor of the *Texas Boll Weevil* test).

117. See *FM Props.*, 22 S.W.^{3d} at 880-88 (providing an analysis of the factors and determining that the first, second, fourth, and sixth factors of the *Texas Boll Weevil* inquiry weighed against the delegation, of which the first and fourth weighed "heavily" against it, but noting that the delegation passed muster under the third and fifth factors of the inquiry, whereas there was a neutral outcome for the seventh and eighth factors).

118. *Id.*

119. Reeder, *supra* note 39, at 213.

120. *Id.* at 223.

121. *Id.*

Nonetheless, while it is true that the application of the *Texas Boll Weevil* test has not yet resulted in clear numerical formulas and weights for each of the eight factors, the Texas Supreme Court has, at each application of the test, increasingly approached this point.

For example, after applying the test only three times, the court surmised in *FM Properties* that of all eight factors, those touching upon meaningful government review and the financial or personal interest of the private delegate, the driving concerns of the Private Non-Delegation Doctrine, are most important. Furthermore, the same questions raised with respect to the lack of a clear mathematical formula for determining whether a private delegation is unconstitutional are common to many case-by-case, multi-step judicial tests. The nature of the law is such that it is difficult to provide precise mathematical formulas, given the varying nature of facts and the myriad ways in which enabling statutes authorizing private delegations may be made.

Moreover, the *Texas Boll Weevil* test, while not perfect, is one of the few comprehensive tests that examine the constitutionality of private delegations of public power. The test is, therefore, a good starting point by which to analyze this issue, given that it addresses the essence of the Private Non-Delegation Doctrine—a desire to mitigate the potential for abuses of public power when it is delegated to an unaccountable private delegate.

D. Proposed Modifications of the Texas Boll Weevil Test that Address Private Delegations¹²² of Eminent Domain Power

1. The eight-part core test

The *Texas Boll Weevil* test is a good analytical starting point because it is one of the few comprehensive tests to examine the constitutionality of private delegations, and it addresses and distills many of the long-time concerns of many commentators. There is, nonetheless, room for improvement of the test in the eminent domain context.

For example, the following four factors of the *Texas Boll Weevil* test go far in addressing the core concern of the Private Non-Delegation

122. As construed in this Article, the term “private delegations” concerns only the delegation of eminent domain power to private non-profit and charitable corporations, and it does not include the delegation of this power to “common carriers” such as railroads and public utilities. See *supra* notes 37-42 and accompanying text.

Doctrine, the prevention of an abusive exercise of public power by a private delegate with interests that conflict with those of the public: (1) meaningful government oversight of the delegation, (2) whether or not individuals affected by a private delegate's action have an opportunity to be heard, (3) the self-interest of the exercised action by the private delegate and how this interest affects the delegate's public function, and (4) whether or not there are any existing limitations on the private delegate's power.¹²³ These four factors would appear to be most important in assessing the constitutionality of the private delegation of eminent domain power, especially when examined in light of the case studies of the Texas Medical Center and the Dudley Neighborhood Initiative, Inc.

However, it may be argued that the qualification on one "heavily" weighted factor of the *Texas Boll Weevil* test, concerning a private actor's pecuniary or personal interest, should be amended. As is evidenced by the two case studies,¹²⁴ instead of qualifying the private delegate's interest in terms of one "that may conflict with his or her [the private actor's] public function,"¹²⁵ the qualification should be couched in terms that relate to a landowner's, a resident's, or a community's interest.

On the other hand, while these four factors may address the two particular delegates and the enabling statutes in the case studies in this Article, future statutes may conceivably arise that permit a private actor the right to define criminal sanctions if a landowner were to resist the taking of his or her property, another of the *Texas Boll Weevil* factors.¹²⁶ Therefore, although (1) meaningful government oversight of the delegation, (2) an opportunity to be heard by affected individuals, (3) an examination of the interests of the private delegate, and (4) an analysis of any existing limitations on the private delegate's power address the *current* central concerns of the Private Non-Delegation Doctrine in the eminent domain context, they may not in future delegations of the takings power. Thus, for this reason alone, the *Texas Boll Weevil* test is useful because of its comprehensive nature in addressing a wide range of issues that may arise through private delegations of any sort of traditional governmental and coercive power, particularly eminent domain power.

123. These factors are respectively the first, second, fourth, and sixth factors of the *Texas Boll Weevil* test. *Texas Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 472 (Tex. 1994).

124. See *infra* Parts IV.A & B.

125. *Texas Boll Weevil*, 952 S.W.2d at 472.

126. This factor is the fifth item in the *Texas Boll Weevil* test. *Id.*

2. *The initial three-part inquiry*

In addition, apart from the eight-factor core of the test, the initial three-part inquiry of the *Texas Boll Weevil* test seems to be unduly laden with particularly unwieldy issues when using it to assess the constitutionality of the delegation of eminent domain power to private non-profit and charitable corporations. For instance, the first part of the initial three-part inquiry centers on whether or not there has been legislative or law-making power delegated to a private actor.¹²⁷ This analysis has required, in some instances, substantial feats by the Texas Supreme Court to conform a particular delegation to nebulous definitions of legislative or law-making power that mandate that public policy be impacted or that a private delegate engage in rulemaking.¹²⁸

A less unwieldy inquiry, especially in the eminent domain arena, may, however, be one that centers on determining whether or not a power is traditionally public, governmental, and therefore coercive. A coercive power is one that has traditionally been exercised by government.¹²⁹ Delegation of eminent domain power to a private actor would, therefore, clearly fit within the confines of this definition.

Moreover, the second part of the initial three-step test in recent Texas practice has often been a needlessly drawn-out examination determining whether or not an actor is public or private.¹³⁰ For instance, in *FM Properties* and in *Proctor*, the Texas Supreme Court was clear from the outset that delegation to a private actor was at issue. In *Proctor*, power had been delegated to private arbitrators that were unaffiliated with state government.¹³¹ In *FM Properties*, the delegation had been made to private landowners.¹³²

In *Texas Boll Weevil*, however, the court appeared to undergo a tortured process-of-elimination analysis in determining whether or not the Official Cotton Growers' Boll Weevil Eradication Foundation

127. *Id.* at 465.

128. *See* *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 873-74 (Tex. 2000) (noting that legislative or law-making power is one that impacts public policy or engages in rulemaking, while failing to specify how the particular delegation at issue in the case fit into the definition) (citing *Texas Boll Weevil*, 952 S.W.2d at 466-67).

129. *See supra* notes 5 & 20-23.

130. *Texas Boll Weevil*, 952 S.W.2d at 465.

131. *Proctor*, 972 S.W.2d at 733.

132. *See FM Props.*, 22 S.W.3d at 875 ("The City asserts that Section 26.179 delegates legislative power to private landowners. We agree.").

was a private or a public entity.¹³³ On the one hand, the Texas Commissioner of Agriculture had to certify the Foundation, making the Foundation appear to be a public actor. On the other hand, the court cited the following factors to determine that the Foundation was a private actor: (1) the Foundation was ultimately a private, non-profit organization that had resulted from the petitioning of the Commissioner of Agriculture by Texas Cotton Producers, Inc., another non-profit that represented growers of cotton,¹³⁴ (2) the Foundation's board members did not have to take public oaths of office, (3) the funds collected by the Foundation were statutorily outside the scope of state funds, and (4) the funds were not subject to governmental procurement and audit requirements.¹³⁵ While theoretically there may be instances in which it may be unclear if a particular entity delegated this power is a private or a public agency, this part of the initial three-part *Texas Boll Weevil* inquiry in the eminent domain context may be unnecessary, given the limited amount of potentially private actors that fall outside the traditional delegates of eminent domain power-railroads, public utilities, and private actors of similar ilk.¹³⁶

IV. AN INTRODUCTION TO TWO CASE STUDIES IN WHICH EMINENT DOMAIN POWER HAS BEEN DELEGATED TO PRIVATE, NON-PROFIT OR CHARITABLE CORPORATIONS

The two case studies discussed in this section of this Article are actual examples in which the very public power of eminent domain has been delegated to a private non-profit or charitable corporation. The first case study, the Texas Medical Center, illustrates the inherent abuses about which the Private Non-Delegation is concerned when the takings power is delegated unconstitutionally to an unaccountable non-profit corporation. In contrast, the second case study, Dudley Neighbors, Inc, represents the opposite end of the private non-delegation spectrum and the benefits of these delegations when appropriate statutory accountability mechanisms are put into place that mitigate any abusive exercises of power as a

133. See *Texas Boll Weevil*, 952 S.W.2d at 470-71 (undertaking the private v. public actor analysis).

134. See *id.* at 459 (noting that Texas Cotton Producers, Inc. spurred the creation of the Foundation).

135. *Id.* at 470-71.

136. See *supra* notes 37-42 and accompanying text.

result of any diverging interests between the private delegate and the public.

A. Case Study One: The Texas Medical Center (“TMC”)

1. History

The Texas Medical Center (“TMC”) is a non-profit charitable corporation¹³⁷ that oversees the largest medical complex in the world,¹³⁸ spans more than 1,000 acres of land in the heart of Houston, Texas¹³⁹ to which over thirteen hospitals, two medical schools, and four nursing schools, with additional schools of dentistry, public health, and pharmacy belong.¹⁴⁰ Although TMC does not itself provide patient care or employ any medical personnel, it owns and manages much of the real property and provides maintenance and ancillary services, including upkeep of roads, landscaping, and constructing of parking facilities, for its forty-two member institutions.¹⁴¹ As an example of the influence that TMC has, the member institutions of TMC brought approximately \$3.5 billion in medical research funding to Houston between the years 2000 and 2004, employed over 63,000 workers in 2004, and had 5.2 million patient visits in 2004 alone.¹⁴²

TMC was granted the power of eminent domain in 1959.¹⁴³ It has used its takings power on at least one occasion in 2004 to condemn a

137. See TEX. REV. CIV. STAT. art. 3183b-1 § 1 (2005).

138. Visit Houston Texas Fast Facts, http://www.visithoustontexas.com/visitors/fast_facts/ (last visited Jan. 24, 2007).

139. Texas Medical Center Master Plan 2006, <http://www.tmc.edu/masterplan/2006/HiRes2006updatev.2.pdf>, p.2 (last visited Jan. 24, 2007).

140. Texas Medical Center Introduction, <http://www.tmc.edu/tmc-introduction.html> (last visited on Jan. 24, 2007).

141. Texas Medical Center Facts and Figures, <http://www.tmc.edu/tmc-facts.html> (last visited Jan. 24, 2007) [hereinafter TMC Facts]; see also GuideStar.org, <http://www.guidestar.org/pq>ShowGsReport.do?np.oID+14224> (last visited Jan. 24, 2007).

142. TMC Facts, *supra* note 141.

143. See TEX. REV. CIV. STAT. art. 3183b-1 (2005). Although the statute does not mention TMC by name, the description of the non-profit charitable corporation contained in the statute matches that of TMC. For instance, section one of the statute notes that “[a]ny nonprofit corporation incorporated under the laws of this state for purely charitable purposes and which is directly affiliated or associated with a medical center having a medical school recognized by the Council on Medical Education and Hospitals of the American Medical Association as an integral part of its establishment, and which has for a purpose of its incorporation the provision or support of medical facilities or services for the use and benefit of the public, and which is situated in any county of this state having a population in excess of six hundred thousand (600,000) inhabitants according to the most recent Federal Census shall have the power of eminent domain and condemnation. . . .” *Id.*

residential house in an adjacent neighborhood as part of a plan to construct a five-story, approximately 500-space parking garage on land previously occupied by houses in a residential neighborhood in Houston.¹⁴⁴ The parking garage was opposed by the residents in the neighborhood not only because of the attendant safety and aesthetic concerns with having a large parking structure in a residential area with many families with young children, but also because it violated the community's deed restrictions, or private land covenants, that restricted the use of property in the neighborhood to largely single-family housing.¹⁴⁵

2. *Accountability mechanisms in TMC's enabling legislation*

TMC has very little statutory restrictions in place that require it to be accountable to the public when it exercises its statutorily delegated takings power. This lack of accountability controls sets the stage for abusive exercises of power when TMC uses its takings power for its own interests, without taking into account those of the public or a community. For example, sections two and four of the Texas enabling statute allow TMC to use Pac-Manesque powers to use its "full authority" of eminent domain power to acquire "adjacent or contiguous" property to it.¹⁴⁶ As TMC grows, it may seize more and

144. See *Texas Med. Ctr. v. Joe Alfred Izen, Jr. & City of Houston, Texas*, No. 814.303 (Harris County Ct. Aug. 13, 2004) (noting that the county commissioners' award to TMC assessed the value of the seized real property at \$80,000 in the condemnation proceeding). In the interest of full disclosure, the Author notes that the taking of this real property occurred in her neighborhood and the plan and eventual construction of the parking garage in violation of private deed restrictions was vigorously protested by the Central City Preservation Coalition, the arm of the neighborhood homeowner's association designed to protest the construction and taking. The author was Vice-Chair of this organization. For Texas legislative hearings regarding the neighborhood's protests, see Texas House Bill 2537 in the Land and Resource Management Committee (during the 79th Regular Session), <http://www.house.state.tx.us/fx/av/committee79/50421p25.ram>. Representative Garnet Coleman's, the Texas House of Representatives member who aided the Central City Preservation Coalition, exchange with Rep. Beverley Wooley on Texas Senate Bill 62, regarding limitations on eminent domain, on the floor of the Texas House is at 1:10:10 can be found at <http://www.house.state.tx.us/fx/av/chamber79/081005a.ram>. In addition, as a result of these protests in the Author's neighborhood, a city-wide civic group, Citizens Against Eminent Domain Abuse, was formed, of which the Author is Chair.

145. See *Texas Medical Center v. Joe Alfred Izen, Jr. & City of Houston, Texas*, No. 814.303 (Harris County Ct. Aug. 13, 2004).

146. See TEX. REV. CIV. STAT. art. 3183b-1 §§ 2,4 (2005) (granting TMC "full authority and [eminent domain] power" "for the purpose of acquiring lands adjacent to or contiguous (whether or not separated by public thoroughfares)" to it for the construction, maintenance, and operation of "facilities dedicated to medical care, teaching, and research for the public welfare, including ancillary or service

more land near it.¹⁴⁷ In addition, sections three and four of the statute permit TMC to use its takings power to transfer title or to lease property acquired through eminent domain to any “nonprofit corporation, association, foundation, or trust” for 99 years with a renewal option.¹⁴⁸

On the other hand, there are at least three restrictions on TMC’s use of the takings power in the enabling legislation. First, section five of the law notes that should TMC acquire property through eminent domain and choose not to use the acquired land “for the purpose of medical care, teaching, or research or essential ancillary and service activities,” then title to the seized property will revert to the original owner or to his or her “heirs, devisees, or assigns.”¹⁴⁹ Second, section six of the enabling statute, a recent amendment to it, requires that before TMC begins the takings process or records title to acquired real property, it must provide “written notice by certified mail” to each recorded landowner of property for each parcel of land that it “seeks to acquire or purchase; or that is not more than 200 feet from any boundary of any unit of real property.”¹⁵⁰ The intended use of the property, whether it is seized through eminent domain or purchased outright, must not comport with deed restrictions or private land covenants.¹⁵¹ Third, the statute mandates that should TMC exercise its takings power, then a condemnation hearing must be held in which three special county commissioners’ award damages and costs to an aggrieved landowner for his or her property.¹⁵² However, once TMC pays the damages and costs to a landowner, deposits this money with the court, and executes a bond, then it may take possession of the seized property.¹⁵³

activities generally and customarily recognized as essential to such facilities in a medical center.”).

147. *Id.*

148. *Id.* §§ 3,4.

149. *Id.* § 5.

150. *Id.* § 6. Deed restrictions are private contractual limitations on the use of real property that run with the land, commonly found on parcels of land located in established neighborhoods in Houston, Texas. Because the city of Houston does not have zoning requirements that restrict the use of land by city ordinance, many neighborhoods rely on deed restrictions to ensure that the residential character of lots in neighborhoods is preserved.

151. *Id.*

152. *Id.* § 6(a); TEX. PROP. CODE. § 21.021(a) (2005).

153. TEX. PROP. CODE § 21.021(a) (2005). This judicial process is designed simply to assess the value of the land, not the basis on which TMC has the takings power.

3. *Preliminary analysis of accountability mechanisms*

The statutory restrictions on TMC's eminent domain power are minimal at best, especially in comparison to those of the second case study, DNI. Moreover, the restrictions do not lead to the sort of accountability that is constitutionally mandated by the Private Non-Delegation Doctrine such that an abusive exercise of the takings power, as occurred in the Houston neighborhood, will not take place. There is no direct or indirect accountability to the electorate or to affected populations. Indeed, TMC is a privately-run non-profit organization with a privately-appointed board of directors that remains largely anonymous to the public and to the electorate.¹⁵⁴

For instance, the reversion interest to the original landowner that is mandated if TMC does not use land seized by eminent domain for medical care, teaching, research, or ancillary or service purposes¹⁵⁵ is a restriction on TMC's takings power, but yields no accountability to anyone. The reversion of land occurs only after: (1) the taking has taken place, and (2) time has elapsed to indicate that TMC will not use the acquired land in accordance with the statutorily mandated restriction on its use. Therefore, TMC may still fundamentally exercise the public power of eminent domain in a way that benefits the organization to the detriment of the public or a community, until it chooses not to use the property for a particular purpose.

Nonetheless, this restriction on the use of seized land may be self-defeating, given that there is no time limit included in the statute as to when reversion may take place, once TMC has failed to comply with the purpose of the seized land. Does reversion take place after 30 days, months, years, etc.? Therefore, what statutory restrictions on TMC's eminent domain power that may have been contemplated in the statute with respect to reversion are negated by the lack of a time requirement regarding when a purpose is unfulfilled and when reversion must occur.

Moreover, the notice requirements in the statute that become effective once TMC decides to pursue condemnation or even to purchase real property for an intended use that does not accord with private deed restrictions,¹⁵⁶ are helpful in that they alert surrounding

154. For instance, information on board members is publicly unavailable on [guidestar.org](http://www.guidestar.org), a public interest website that tracks non-profit organizations and lists the board members of many non-profit organizations. GuideStar.org, <http://www.guidestar.org/pqShowGsReport.do?np.oID+14224> (last visited Jan. 24, 2007)

155. TEX. REV. CIV. STAT. art. 3183b-1 § 5 (2005).

156. *Id.* § 6.

landowners, as well as the owner of targeted property, to potentially incompatible uses of real property. The notice requirements may also help neighborhoods and individuals to mount and to mobilize a potential political solution to the use of eminent domain or the purchase of real property by TMC. While this recent amendment to the TMC enabling statute may be considered welcome relief to landowners in an area targeted for exercise of eminent domain power, the fact remains that while TMC may give notice, it may also ultimately exercise its delegated right to eminent domain, regardless of the interests of a neighboring community. Thus, this notice restriction does not also provide the sort of accountability that would place TMC's delegated takings power in line with the Texas Private Non-Delegation Doctrine.

In addition, the third statutory restriction on TMC's use of the takings power, regarding the mandate that a condemnation hearing be held and three commissioners be appointed to assess the value of the land taken by TMC,¹⁵⁷ is similarly unavailing. At the point that a condemnation hearing is held, the only purpose of the proceeding and appointment of the commissioners is to determine the compensation that should be awarded a landowner whose property has been seized.¹⁵⁸ This hearing does not contemplate the hearing of arguments related to the constitutionality of the delegation of eminent domain power to TMC under the Texas Private Non-Delegation Doctrine or even under traditional Takings and Public Use clauses jurisprudence under the state or the federal Constitution.¹⁵⁹

Further, the restrictions on TMC's takings power in the enabling legislation actually serve to make the non-profit less accountable to the public than it already is when wielding the very public power of eminent domain. For instance, the statute authorizes that TMC may exercise eminent domain power for ancillary or service purposes related to medical care, teaching, and/or research.¹⁶⁰ However, the statute does not include any statutory limitations or definitions of what constitutes an ancillary or service purpose that would merit the use of eminent domain. Therefore, because these terms remain undefined, arguably any purpose for the use of the seized land, regardless of how much it may conflict with the desires of the public

157. See *supra* notes 144, 152-53 and accompanying text.

158. TEX. PROP. CODE § 21.021(a) (2005).

159. See *supra* notes 33-35 and accompanying text.

160. TEX. REV. CIV. STAT. art. 3183b-1 § 5 (2005).

or a community, may be used to justify the organization's exercise of eminent domain. These self-interested purposes could ostensibly include parking or recreational facilities in a particular area in which TMC was able to acquire real property at relatively low market rates, such as what happened in the Houston neighborhood, TMC's most recent exercise of eminent domain.¹⁶¹ These acquisitions are in comparison to alternative sites with potentially higher costs but lower indices of social and public disruption.

Moreover, the enabling statute arguably allows TMC to be a virtual property Pac-Man, gobbling up land via the takings power, that is ever contiguous or adjacent to its previously acquired property.¹⁶² Therefore, as the non-profit attains property, either through outright purchase of land through negotiations with a landowner or through use of the coercive power of eminent domain, real estate next to this property is then at risk or is under statutory threat of being seized. The effect of this statutory permissiveness is to provide TMC with almost blank-check authority to exercise or to threaten to exercise eminent domain powers on land that is located near any of its property, regardless of the location of the land, how it is currently being used, and future plans for its use by TMC.

Finally, even if TMC does not use its power of eminent domain delegated to it by the Texas legislature, by virtue of its having the power under the enabling statute, private property covenants restricting the use of the land, or deed restrictions, acquired by TMC are effectively extinguished.¹⁶³ The effect of this statutory permissiveness, therefore, appears to be just the sort that potentially provides a breeding ground for opportunities by private non-profit actors to use the mere threat of eminent domain authority in self-interested ways and that ignores the interests of the larger public and community in contravention of the Texas Private Non-Delegation Doctrine.

161. See *supra* note 144 and accompanying text.

162. TEX. REV. CIV. STAT. art. 3183b-1 §§ 2,4 (2005).

163. See Letter from Robert B. Neblett III of Jackson Walker L.L.P. to Andrew Icken, Executive Vice President of TMC (Jan. 21, 2005) ("At your request we have set forth below a legal explanation of how the Texas Medical Center's ("TMC") acquisition of real property located within the Central City subdivision of Houston (the "Property") has extinguished any applicable deed restrictions. . . . Furthermore, the fact that some of the Property was acquired by purchase, instead of condemnation, does not affect the outcome. The deed restrictions are nonetheless terminated by TMC's acquisition.") in reference to the private deed restrictions in the Houston neighborhood in which TMC exercised the takings power delegated to it to build a parking garage prohibited by the restrictions.

B. *Case Study Two: Dudley Neighbors, Inc./Dudley Neighborhood Street Initiative*

As a counterpoint to the enabling legislation in the TMC example, the delegating statute in the Dudley Neighbors, Inc. (“DNI”) case study includes a number of accountability controls that permit the delegation of the takings power to conform to the constitutional demands of the Massachusetts Private Non-Delegation Doctrine.¹⁶⁴ Therefore, the DNI example provides a model for state legislatures that have already delegated the takings power to private, non-profit corporations or that are contemplating the delegation.

1. *History*

Dudley Neighbors, Inc. (“DNI”), is the eminent domain arm of the Dudley Street Neighborhood Initiative (“DSNI”), a Boston, Massachusetts community group with the mission of revitalizing the long-neglected Dudley neighborhood in the Roxbury/North Dorchester section of Boston.¹⁶⁵ When DSNI was formed in 1984, there were 1,300 trash-filled empty property lots in the Dudley neighborhood.¹⁶⁶ In particular, DNI is a non-profit urban community land trust.¹⁶⁷ Its charge has been to use the takings power to assemble disparate parcels of primarily vacant land in the Dudley Triangle section of the neighborhood to construct affordable housing.¹⁶⁸ For instance, in the early 1990s, DNI used eminent domain on 132 vacant parcels of land that were eventually used to build 134 affordable-housing units for residents of the neighborhood.¹⁶⁹ Subsequently,

164. See *DiLoreto v. Fireman’s Fund Ins. Co.*, 418 N.E.2d 612, 614-15 (Mass. 1981) (stating that “It is well established in this Commonwealth and elsewhere, that the Legislature cannot delegate the general power to make laws, conferred upon it by a constitution like that of Massachusetts”) (citing *Brodline v. Revere*, 66 N.E. 607 (Mass. 1903); *Opinion of the Justices*, 105 N.E.2d 565 (Mass. 1952); *Opinion of the Justices*, 19 N.E.2d 807 (Mass. 1939)). *DiLoreto* further noted that “[d]elegation of legislative power to private parties has sometimes been held to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States,” but it reiterated that in Massachusetts private delegations are constitutional as long as “proper safeguards” are put into place. *Id.* at 246 (citing *Corning Glass Works v. Ann & Hope, Inc.*, 294 N.E.2d 354, 363 (Mass. 1973)).

165. THE ENTERPRISE FOUNDATION, PROGRAM PROFILE: DUDLEY STREET NEIGHBORHOOD INITIATIVE 1 (2000), <http://www.practitionerresources.org/cache/documents/19319.pdf> [hereinafter THE ENTERPRISE FOUNDATION].

166. The Catalogue for Philanthropy, Dudley Street Neighborhood Initiative, http://www.catalogueforphilanthropy.org/ma/2005/dudley_street_5605.htm (last visited Jan. 24, 2007) [hereinafter Catalogue for Philanthropy].

167. THE ENTERPRISE FOUNDATION, *supra* note 165, at 13.

168. *Id.*

169. *Id.* at 13-14.

DNI's eminent domain power has been used to seize land for additional homes, a greenhouse for Dudley residents, gardens, and parks.¹⁷⁰

2. *Mechanics of accountability mechanisms in DNI's enabling legislation*

The relevant Massachusetts enabling statute allows an urban redevelopment corporation, including a charitable corporation, to take land by eminent domain, provided that certain extensive procedures, ostensibly designed to foment accountability in the takings process, are followed.¹⁷¹ Massachusetts courts view urban redevelopment corporations, although some may be technically classified as for-profit corporations, as more akin to public service or charitable corporations because they are designed to benefit the public.¹⁷²

The first step is that the Boston Redevelopment Authority ("BRA") must delegate to DNI the power of eminent domain, a power that has already been delegated to BRA.¹⁷³ Second, DNI, or any other urban redevelopment corporation formed pursuant to the statute, must be engaged in revitalizing blighted areas of certain communities in Massachusetts.¹⁷⁴ Third, before DNI may undertake a project, before the exercise of eminent domain power is even contemplated, it must receive approval from both the planning board and the city council of the city of Boston, following a public hearing on the issue.¹⁷⁵ Notice for the public hearing must be published on at least two occasions, no earlier than fourteen days before the date of a hearing, in a newspaper of general circulation and posted in a conspicuous place in Boston.¹⁷⁶ The enabling statute then requires that a second form of mailed notice be given to all landowners who are within or abut a proposed project.¹⁷⁷

In addition, the planning board must submit a report, within forty-five days of the public hearing that includes an analysis of details such

170. Catalogue for Philanthropy, *supra* note 166.

171. See MASS. GEN. LAWS ch. 121A, §§ 3, 11 (2006).

172. Opinion of the Justices, 135 N.E.2d 665, 667, 334 (Mass. 1956).

173. See MASS. GEN. LAWS ch. 121A, § 3 (2006); see also The Dudley Street Neighborhood Initiative Website, www.dsni.org/dni/ (last visited Jan. 24, 2007); THE ENTERPRISE FOUNDATION, *supra* note 165, at 13.; Elizabeth A. Taylor, Note, *The Dudley Street Neighborhood Initiative and the Power of Eminent Domain*, 36 B.C. L. REV. 1061, 1075 (1996).

174. MASS. GEN. LAWS ch. 121A, § 3 (2006).

175. *Id.* § 6.

176. *Id.* § 6B.

177. *Id.* § 6.

as whether or not the area is blighted and how the proposed redevelopment comports with the city's master plan.¹⁷⁸ The report must also include a recommendation to approve or to disapprove a project to the city council.¹⁷⁹ The city council, in turn, is then charged with submitting a report that approves or disapproves a project to the mayor, within ninety days of the public hearing and within forty-five days of the council's receipt of the planning board's report.¹⁸⁰ Furthermore, both reports must be written and made available to the public, including copies sent by certified mail to those individuals who were notified of the public hearing.¹⁸¹ Moreover, any person "aggrieved by the approval or disapproval of a project" has sixty days within the time that the city council has transmitted its report to the mayor to seek recourse in the courts.¹⁸²

Another accountability check on the use of eminent domain power by DNI or other urban redevelopment corporations in Massachusetts is that a project must provide a means, for persons or families who are displaced by the exercise of the power to be provided in the site or in an equivalent area the following three items: (1) a place to live that is similar in rent to the displaced dwelling; (2) is "reasonably accessible" to their places of employment; and (3) is safe, decent, and accessible to public utilities, shopping, and public transportation.¹⁸³ A project may not be approved by the planning board or city council if contingency plans for displaced families and individuals through the use of eminent domain are not included.¹⁸⁴

A final accountability control on the exercise of the takings power by DNI is that once a project is approved by the planning board and city council, a certificate is issued to BRA. BRA then makes a third, separate and final determination of a project's approval.¹⁸⁵

3. Accountability controls inherent in DNI's and DSNI's organizational structure

The significant statutory accountability mechanisms in the enabling statute of the DNI have the effect of mitigating any conflicting interests of DNI and the public or the surrounding

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* § 6C.

183. *Id.* § 6.

184. *Id.*

185. *Id.* §§ 3, 6; see Taylor, *supra* note 173, at 1076.

community. In addition, there are a number of accountability controls inherent in the pure organizational structure of DNI and of its parent organization, DSNI, that further soften any divergent interests and tamp down a potential abusive exercise of the takings power by DNI. For instance, DNI is governed by an eleven-member board of directors, six of whom are appointed by DSNI and one each appointed by the mayor of Boston, the Roxbury Neighborhood Council, the city council member for the district, and the state senator and state house representative for the neighborhood.¹⁸⁶ DSNI, the parent organization of DNI, is in turn governed by a twenty-nine-seat board of directors, fourteen of whom are residents (both adults and youth) of the Dudley neighborhood, with the remaining board members representing seven other non-profit agencies, two community churches, two neighborhood businesses, and two community development organizations.¹⁸⁷ Except for two seats on DSNI's board of directors, all directors are elected by Dudley neighborhood residents.¹⁸⁸

4. *Preliminary analysis of accountability mechanisms*

The main concern of the Private Non-Delegation Doctrine in general, and with respect to the private delegation of the very public eminent domain power to non-profit and charitable corporations, in particular, is that these entities will exercise the takings power in a self-interested, abusive manner to the detriment and to the exclusion of the public interest and in violation of a state's constitution. Opportunities for this manner of exercise are ripe for non-profits delegated the takings power in enabling statutes that do not contain certain controls, such as the electoral accountability that exists when elected government exercises the takings power.¹⁸⁹ As applied to DNI, however, this central focus of the Massachusetts Private Non-Delegation Doctrine is significantly diminished by the wide-ranging accountability mechanisms inherent in the enabling statute and in the organizational structures of DNI and DSNI.

For instance, in the DNI enabling legislation, there is accountability to elected officials for an exercise of eminent domain at almost every level of local government. Indeed, approval for a

186. THE ENTERPRISE FOUNDATION, *supra* note 165, at 11.

187. *Id.*

188. *Id.*

189. See *supra* note 68 and accompanying text (discussing the electoral consequences of elected officials' authorization of eminent domain power).

project must be received by the planning board, the city council, and BRA, all public or quasi-public entities who are either directly or indirectly accountable to voters. Moreover, even though a project does not necessarily require the approval of the mayor, he or she receives the city council's recommendation for a particular project. Therefore, Boston's mayor may ostensibly intervene politically should a particular taking and redevelopment project prove sensitive.

Furthermore, the statutory regime calls for a number of opportunities for the public interest to be heard, given that the law requires that there be a joint public hearing between the city council and planning boards and that affected property owners be given at least three kinds of notice for the hearing. The regime also includes an appeal that aggrieved property owners may use to have their say in the courts. Most importantly, when it comes to the use of eminent domain power by DNI or similar urban redevelopment corporations, the process requires that redevelopment projects may not be approved by the city's planning board if there are no relocation plans for affected residents or landowners.

These numerous statutory accountability processes in the exercise of eminent domain power by DNI serve as checks on the self-interested and abusive use of the takings power by the organization. They are also reinforced by the similar accountability mechanisms in the organizational structures of DNI and DSNI. For instance, five members of DNI's board of directors are selected by elected representatives at all levels of state and local government. Should these representatives approve a taking that is contrary to the Dudley community's will, then presumably the elected officials responsible for their selection may be held accountable on Election Day. Furthermore, the remaining six directors of DNI are selected by DSNI, of which twenty-seven of its directors are selected by the residents of the Dudley neighborhood and of which fourteen must be residents of the community.

These six directors of DNI are therefore held at least indirectly accountable for their vote to use eminent domain power by the ostensibly affected residents of its exercise. Organizational controls call for the Dudley community to be in ultimate control of the use of eminent domain power by DNI, in great contrast to the organizational regime in the TMC example.¹⁹⁰

190. See *supra* Part IV.A & IV.B.

Yet another foundational and historical check on the use of eminent domain power by DNI is that its parent organization, DSNI, was borne out of efforts by the community, in partnership with a local foundation, to improve the neighborhood.¹⁹¹ Thus, to the extent that DNI uses its privately delegated takings power, the community-focused roots of DSNI inform DNI's actions by essentially forcing it to use its power in ways with which the community will agree. Even though DNI's actions may be deemed self-interested because they benefit the community, in keeping with DNI and DSNI's mission, they are wholly disinterested because one particular person or private party is not benefiting—it is the entire Dudley neighborhood.¹⁹²

C. Application of the Modified Texas Boll Weevil Test to TMC and to DNI

1. TMC

a. Applying the Modified Texas Boll Weevil Test to TMC

The first two parts of the initial three-part inquiry of the modified *Texas Boll Weevil* test certainly arrive at the conclusion that TMC, as a non-profit, charitable corporation, is a clear private actor that has been delegated the very public power of eminent domain.¹⁹³ In addition, under the modified eight-part *Texas Boll Weevil* test, the delegation of the takings power to TMC in the current version of the

191. Taylor, *supra* note 173, at 1078-79.

192. David Barron, *Eminent Domain is Dead! (Long Live Eminent Domain!)*, BOSTON GLOBE, Apr. 16, 2006, available at http://www.boston.com/news/globe/ideas/articles/2006/04/16/eminent_domain_is_dead_long_live_eminent_domain?mode=. In this Article, Professor Barron, a professor of state and local government and constitutional law at Harvard Law School, wrote that “[e]minent domain is one tool for improving the conditions of neighborhoods. One of our own area’s most successful community development organizations the Dudley Street Neighborhood Initiative, for example, lobbied to be given the power of eminent domain in the 1980s so it could revive a long-depressed neighborhood in Roxbury. By taking privately owned abandoned property, and developing housing in its place, the private community group was able to do just that.” *Id.* In keeping with the accountability mechanisms that satisfy the demands of the Massachusetts Private Non-Delegation Doctrine, Professor Barron further states in the article that “[r]ather than banning eminent domain for economic development. . . we should focus on reforms that would ensure the communities in which it is so often used have a say in the planning process. That means ensuring those who are least likely to have a voice in economic redevelopment get one.” *Id.*

193. *Texas Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 475 (Tex. 1994).

enabling statute is unconstitutional under Texas' Private Non-Delegation Doctrine.

For example, under the modified *Texas Boll Weevil* test, there is little, if any, meaningful government review of an exercise of eminent domain power by TMC.¹⁹⁴ While the enabling statute permits an aggrieved landowner to have a formal hearing about the contested parcel of land, this hearing is simply to assess the value of the property by three commissioners appointed by the county, not to contest the constitutionality of the delegating legislation.¹⁹⁵ Other than this hearing by the judicial branch, however, no other branch of government, state agency, or branch of municipal or county government has the power to review an exercise of eminent domain power by TMC.

This lack of governmental oversight is even more telling, given that even when TMC acquires property through direct purchase, any deed restrictions, or contractual restrictions on the use of land that run with the land are extinguished, simply by virtue of this private, non-profit's eminent domain power.¹⁹⁶ Thus, that TMC's power is hardly subject to government review, much less meaningful review, appears to weigh "heavily" against the delegation of eminent domain power to it, much like the result of the application of this element of the original *Texas Boll Weevil* test to private landowners delegated the power to control water quality in *FM Properties*.¹⁹⁷ In addition, this result is in marked contrast to that found with respect to DNI, a delegation that includes copious amounts of direct and indirect meaningful government review.¹⁹⁸

Moreover, under the modified version of the *Texas Boll Weevil* test, the issue of whether or not affected persons by a taking are adequately represented in the process to seize the property, similarly weighs against the delegation to TMC. While affected persons in the DNI case study, both landowners and residents, are seemingly represented to a large extent and exert influence in a decision by DNI to use the takings power, persons affected by a similar decision by TMC have little or no representation.¹⁹⁹

194. See *supra* Parts IV.A.2 & IV.A.3.

195. TEX. PROP. CODE. § 21.021(a) (2005).

196. See *supra* note 163 and accompanying text.

197. See *supra* notes 107-10 (for an analysis of the application of the original *Texas Boll Weevil* test in *FM Properties*).

198. See *supra* Part IV.B.

199. See *supra* Parts IV.A & IV.B.

Arguably, however, the recent amendment to the Texas enabling legislation that mandates that affected landowners be notified via certified mail, should the organization purchase or acquire property through eminent domain for a purpose that would not comport with private deed restrictions, is a step in the direction of providing affected persons more representation in the decision-making process.²⁰⁰ For instance, this notice would ostensibly permit aggrieved parties, who may be affected either by the taking of land or a use of land that is incompatible with its historical use and current surroundings of the property, to use political activism to compel representation and perhaps influence in TMC's decision-making process. On the other hand, there is no guarantee that a community could accomplish this aim, and there is no certainty attached to its results, unlike with the Massachusetts enabling legislation. Therefore, this element of the revised Texas test weighs against the delegation of eminent domain power to TMC.

The portion of the modified Texas test examining whether or not the private delegate has a pecuniary or personal interest in the exercise of eminent domain power, also weighs against holding the delegation of the takings power to TMC constitutional under Texas' Private Non-Delegation Doctrine. For instance, unlike DNI, a private, non-profit corporation that is heavily rooted in the community and is controlled to a large extent by the residents of the Dudley neighborhood, TMC's organizational structure as a privately shielded and privately governed non-profit land management and parking concern to its member institutions inherently serves to create a clash of interest with communities. This conflict of interests is only enhanced by the fact that TMC's board of directors is hidden from view and is likely unaffiliated with communities affected by statutorily delegated takings power.

Proof of this clash is found in the sole instance in which TMC used eminent domain and outright purchase to acquire real property in a Houston-area neighborhood to construct a multi-level parking garage. This parking facility was prohibited under the covenants that limited land use in the neighborhood to residential, single-family homes.²⁰¹ Furthermore, despite the fact that the organization used its power of eminent domain for only one parcel of land,²⁰² and acquired the other parcels of land for the parking garage through outright

200. TEX. REV. CIV. STAT. art. 3183b-1 § 6 (2005).

201. See *supra* note 144 and accompanying text.

202. *Id.*

purchase, TMC still “used” its eminent domain power to automatically extinguish the private land covenants, or deed restrictions, on the purchased parcels that restricted the use of the property.²⁰³ Thus, as in *FM Properties*, this clash of interests between not only TMC and a targeted landowner, but also a surrounding community, weighs “heavily” against the delegation of power.²⁰⁴

The final part of the modified *Texas Boll Weevil* test in the eminent domain context involves assessing whether or not the private delegation is limited in “duration, extent, and subject matter.”²⁰⁵ As applied to TMC, this element similarly weighs against the delegation of eminent domain power to it. For instance, the enabling statute permits TMC to acquire property through eminent domain and therefore to extinguish private deed restrictions in adjacent communities in perpetuity. There is little restriction on when TMC’s delegated power of eminent domain terminates.²⁰⁶ The sole limitation on any duration of TMC’s exercise of the takings power occurs *after* the power has been exercised, in which real property will revert to the original owner if the entity does not use it for the purposes designated in the enabling statute.²⁰⁷ Furthermore, in contrast to the larger purpose of revitalizing the Dudley neighborhood for which DNI may use seized land, the purposes for which TMC may use taken land are extremely broad. These purposes also do not necessarily fit within a larger goal of community development. They range from the building of medical facilities used for teaching, research, and patient care purposes to ancillary or service purposes such as parking, a garbage dump, or even attractive landscaping.²⁰⁸

Moreover, TMC is authorized to use its statutorily delegated takings power on any real property that is adjacent to or contiguous to its existing property, however the property was acquired.²⁰⁹ Thus, the use of eminent domain power to acquire one parcel of property would then justify the exercise of the takings power on adjacent land sites, permitting a seemingly endless use of eminent domain and infringement upon applicable land covenants. Therefore, in stark

203. See *supra* note 163 and accompanying text.

204. See *supra* notes 107-10 (explaining the application of the original *Texas Boll Weevil* test in *FM Properties*).

205. See *Texas Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 472 (referencing the sixth factor of the original Texas test).

206. See *supra* Parts IV.A.2 & IV.A.3.

207. TEX. REV. CIV. STAT. art. 3183b-1 § 5 (2005).

208. See *supra* notes 141 & 145-46 and accompanying text.

209. TEX. REV. CIV. STAT. art. 3183b-1 §§ 2,4 (2005).

divergence from the delegation of eminent domain power to DNI, that limits an exercise of the power to the Dudley neighborhood as long as BRA permits and it is for revitalization purposes only,²¹⁰ the duration, extent, and subject matter of TMC's delegation is extremely broad in scope and weighs against the delegation under the *Texas Boll Weevil* test. Thus, all four elements of the modified Texas test weigh against the constitutionality of the delegation of eminent domain power to TMC under the Private Non-Delegation Doctrine in Texas, including two that weigh "heavily" against the delegation under the Texas Supreme Court's holding in *FM Properties*.

b. Applying the original Texas Boll Weevil test to TMC

Even under a more comprehensive approach of an application of the Texas test, encompassing the remaining elements of the original *Texas Boll Weevil* test, the delegation of eminent domain power to TMC still would be unconstitutional under the Texas constitution. For instance, while TMC, in its application of the takings power, does not make rules or apply the law to particular individuals, it also is not empowered to define criminal acts or to impose criminal sanctions on recalcitrant landowners, two elements, respectively, of the original test.²¹¹ Thus, the latter factor weighs in favor of the delegation. On the other hand, it is also apparent that TMC is not specially qualified or trained to exercise eminent domain power,²¹² given that its primary role is as a land management company, not purveyor of eminent domain power, in stark contrast to DNI. Furthermore, the Texas legislature provided little, if any standards that would guide a more disinterested use of eminent domain power by TMC, another element of the original *Texas Boll Weevil* test.²¹³ Combining these results with those of the application of the modified test, a numerical tally indicates that a majority of the factors still weighs against the delegation of the takings power to TMC in the current enabling legislation.

210. See *infra* Part IV.C.2.a.

211. These are the third and fifth factors, respectively, of the original *Texas Boll Weevil* test. *Texas Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 472 (Tex. 1994).

212. This element references the seventh element of the original *Texas Boll Weevil* test. *Id.*

213. This element refers to the eighth factor of the *Texas Boll Weevil* test. *Id.*

2. DNI

a. Applying the Texas Boll Weevil Test to DNI

Under the modified *Texas Boll Weevil* test, the delegation of eminent domain power by the Massachusetts legislature to DNI, the Boston-based, private, non-profit corporation, would likely be deemed constitutional under Massachusetts' Private Non-Delegation Doctrine. For example, the analysis under the modified Texas test for private delegations of eminent domain power proposed in this Article begins with an initial two-part inquiry as to: (1) whether or not traditionally governmental, coercive powers, i.e. public powers, have been delegated; and (2) whether or not these public powers have been delegated to a private entity that rests outside the traditional constitutional categories of private entities delegated the power of eminent domain, such as common carriers, including railroad companies and public utilities. By virtue of its being delegated the power of eminent domain, a traditionally governmental power that is coercive because it can force a landowner to relinquish her real property irrespective of her wishes, DNI has accordingly been delegated a public power. Moreover, DNI is not a common carrier that would fall within the traditional permissible private eminent domain categories—it is a private, non-profit company, albeit with a sizeable community influence over it.

The next step in the application of the modified eight-part *Texas Boll Weevil* test to DNI is an analysis pursuant to the following factors:²¹⁴ (1) whether or not there is meaningful government review of a private delegate's actions by "a state agency or other branch of state government," (2) whether or not individuals who are affected by the delegate's actions have adequate representation in the delegate's "decision making process," (3) assessing the private delegate's economic and/or personal interest, and (4) analyzing whether or not the delegation is "narrow in duration, extent, and subject matter."²¹⁵

214. See *supra* Part III.D.1 (advocating a limitation of the *Texas Boll Weevil* test to these four factors, respectively factors one, two, four, and six of the original *Texas Boll Weevil* test, but also recognizing that this limitation may not address the particularities of divers enabling legislation that delegate the takings power to private entities).

215. *Texas Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 472 (Tex. 1994).

With respect to the issue of whether or not there is meaningful government review as applied to DNI, it is apparent that this factor weighs in favor of the constitutionality of the delegation of the takings power to DNI under Massachusetts' Private Non-Delegation Doctrine. The Massachusetts enabling statute allows for at least five levels of government review by a state agency or other branch of state government.²¹⁶ For instance, both the city council and the planning board must approve a project of DNI, encompassing two levels of review by state government.²¹⁷ BRA, the delegating entity of eminent domain power to DNI, must then perform a tertiary review of the project and then approve or disapprove it.²¹⁸ Fourth, with respect to the specific use of eminent domain power by DNI, the Massachusetts enabling statute requires that, unless reasonable contingency plans are made by DNI for any residents displaced by eminent domain, then the city council and the planning board may not approve the redevelopment project.²¹⁹ Finally, a fifth level of direct government review is that anyone, within sixty days of the city council's having approved or disapproved a project in its report to the mayor, has the statutory right to seek review by the state courts.²²⁰

Not only, however, does the enabling legislation for DNI and similarly situated community development corporations in Massachusetts allow for multiple levels of government review by a number of branches and offices of government, but also the particular organizational structure of DNI's board of directors serves as an *indirect* source of government review on the takings plans of DNI. For instance, four out of the eleven board members of DNI are selected by the mayor, city council representative, state house representative, and state senate representative for the Dudley neighborhood.²²¹ Hence, if a particular taking proves controversial, then the members of DNI's board appointed by elected officials, presumably before approving a project, would likely vote in a manner not inconsistent with electoral forces, allowing these officials to stay in elected office. Therefore, the five levels of direct government review by varied branches and offices, in addition to the indirect government review by a number of different elected offices, ensure

216. MASS. GEN. LAWS ch. 121A, § 3 (2006).

217. *Id.* § 6.

218. *Id.* §§ 3,6.

219. *Id.* § 6.

220. *Id.* § 6(c).

221. THE ENTERPRISE FOUNDATION, *supra* note 165, at 11.

that the meaningful government review portion of the modified *Texas Boll Weevil* test is satisfied.

Moreover, with respect to the issue of whether or not affected persons by a private delegate's actions are adequately represented in the delegate's decision-making process, it appears that this inquiry similarly satisfies the requirements of the *Texas Boll Weevil* test and ultimately, the demands of the Massachusetts version of the Private Non-Delegation Doctrine. Three of these ways are direct, and one is indirect. First, the enabling state statute requires that two types of notice be sent to any landowner whose land is adjacent to a project not more than fourteen days in advance of the joint public hearing of the city council and planning board.²²² Second, the landowners have an opportunity, in advance of a project's approval by the city council and the city's planning board, to voice their concerns and to be heard before the decision-makers. Third, the fact that contingency plans must be erected for any resident affected by a project that involves the taking of land, necessarily implies that affected residents' interests are taken into account in a project that involves eminent domain.²²³ Fourth, an *indirect* way in which affected persons are represented in DNI's decision-making process is that Dudley neighborhood residents, whether or not landowners, essentially elect six out of DNI's eleven directors.²²⁴ Neighborhood residents elect the vast majority of the directors of DSNI, which then chooses six of DNI's board members.²²⁵ Therefore, because affected landowners and residents have four levels of representation in DNI, this element of the modified *Texas Boll Weevil* test also weighs in favor of the constitutionality of the delegation of the takings power to DNI under Massachusetts' Private Non-Delegation Doctrine.

With respect to the part of the modified *Texas Boll Weevil* test that addresses the private delegate's economic or personal interest regarding the exercise of the takings power, it is similarly apparent that this factor also weighs in favor of constitutionality of the delegation of eminent domain power to DNI. In DNI, the interests of it and the community at large, including landowners and residents, are intertwined. For example, DNI's stated charge, which then necessarily guides its interest, is to assemble and to develop vacant land parcels in the Dudley neighborhood of Boston, for the purpose

222. MASS. GEN. LAWS ch. 121A, § 6 (2006).

223. *Id.*

224. THE ENTERPRISE FOUNDATION, *supra* note 165, at 11.

225. *Id.*

of primarily constructing affordable housing for its residents.²²⁶ Indeed, the Massachusetts enabling statute mandates that the core of DNI's mission be revitalization.²²⁷ Therefore, while DNI may arguably have a self-interested motive to achieve its core mission, this mission and interest is inherently guided and tempered by the community. Thus, there is little conflict with DNI's interest and the larger interest of the Dudley neighborhood and the public.

An analysis of whether or not the delegation is narrow in scope also responds favorably to the question of whether or not the delegation of the takings power to DNI is constitutional under the Private Non-Delegation Doctrine of Massachusetts. For instance, while there is no technical limit on the duration of the eminent domain power of DNI, presumably there is a practical limit on it, given that there is only a certain amount of land that may be revitalized in the neighborhood. Moreover, DNI's power is statutorily limited by BRA's delegation of eminent domain power to it.²²⁸ BRA could presumably revoke the power that it has delegated once DNI's mission of revitalizing the neighborhood has been accomplished. In addition, DNI is limited to exercising eminent domain power within the confines of the Dudley neighborhood, and it can only act to use this power in revitalizing the area. Consequently, DNI is limited in content and subject matter, and this fourth element weighs in favor of the constitutionality of the delegation.

While recognizing that the previously discussed four elements of the modified *Texas Boll Weevil* test are likely most important with respect to the delegation of eminent domain power to private, non-profit actors, this Article is also cognizant that other elements of the original eight-part Texas test may be invoked in any number of statutes that delegate the takings power to these non-traditional private actors of eminent domain.²²⁹ Therefore, for purposes of being as comprehensive as possible, this Article will also undertake analysis of DNI pursuant to the remaining elements of the original *Texas Boll Weevil* test.

First, with respect to the element of the original test encompassing whether or not the "private delegate's power is limited to making rules" or simply applying the law to particular individuals,²³⁰ it would

226. *Id.* at 13-14.

227. MASS. GEN.LAWS. ch. 121A, § 3 (2006).

228. *Id.*

229. *See supra* Part III.A.

230. *Texas Boll Weevil*, 952 S.W.2d at 472.

appear that this element is inconclusive as applied to DNI and its statutorily delegated eminent domain power. DNI's delegation involves neither making rules nor applying the law to certain persons. Second, the inquiry weighs in favor of the delegation because DNI does not have the power to define criminal acts or to impose criminal sanctions, another element of the original Texas test. Third, the Texas test similarly weighs in favor of the constitutionality of DNI's delegation of the takings power, as DNI was specifically created to assemble vacant land for the DSNI using eminent domain authority, and arguably it has special qualifications to exercise the power.²³¹ Finally, with respect to the element of whether or not the legislature has provided adequate standards to the private delegate in the original Texas test, the Massachusetts legislature and BRA directly and indirectly have provided standards that guide DNI in the exercise of its taking power. For example, they have mandated that DNI's takings power may only be exercised for the revitalization of the Dudley neighborhood and that any exercise of the takings power that impinges on residents be counter-balanced with contingency plans for them.²³²

V. STATUTORY SOLUTIONS

A. *A Range of Proposals*

As exemplified by the TMC example, when private non-profits exercise the takings power with little or no controls that hold them accountable to the electorate, there is an increased opportunity for abuses of the highly coercive eminent domain power. Short of advocating a per se rule against the delegation of eminent domain power to private, non-profit and charitable corporations, this Article proposes a number of statutory regimes that state legislatures may consider in order to permit the delegation to survive constitutional muster under a Private Non-Delegation Doctrine test such as the one constructed by the Texas Supreme Court in the *Texas Boll Weevil* case. Ultimately, the practical effect of these statutory solutions is to increase the accountability of a private non-profit corporation that has been delegated the takings power, and, as a corollary, to lessen the chance of an abusive exercise of the takings power caused by divergent interests between the public and the private delegate. In

231. See *supra* notes 165-68 and accompanying text.

232. See *supra* notes 174 & 183-84 and accompanying text.

addition, this Article advocates taking a more comprehensive approach to these statutory solutions, ensuring that a number of accountability safeguards are included in legislation, as in the Massachusetts/DNI case, rather than just a single safeguard. It is also important to remember that, some legislatures, upon a re-visiting of existing legislation or legislative proposals, may simply forgo a delegation at all, given the constitutional outcome of the delegation under a test similar to a *Texas Boll Weevil* analysis.

First, an obvious statutory solution is one that is included in the enabling legislation for the DNI case, as well as suggested by the amended and original versions of the *Texas Boll Weevil* test. This solution involves inclusion of statutory provisions that mandate that an exercise of eminent domain by a private charitable corporation be approved by a state agency, a state legislature, or even several offices of state and local government. The preference, however, is that officials who are directly elected by the voting populace must approve a takings exercise.²³³ For instance, in the case of DNI, a development project must be approved by three levels of local government: (1) the Boston city council, (2) the city's planning board, and (3) BRA.

Furthermore, the idea of ensuring that a private actor's taking power is submitted for review by a governmental office is not unheard of. Indeed, when public utilities or railroads that have been delegated the takings power choose to exercise it, they must often seek approval from a branch of state government.²³⁴ In addition, the provisions allowing for an official who is directly elected to approve an exercise of the takings power by a private, charitable corporation serve as further assurance that the private delegate will not engage in unaccountable abusive action.

A second legislative solution is to include a damages provision in the enabling legislation of the delegation for an affected landowner or resident that is harmed by an exercise of the takings power by a

233. In Virginia, for example, the Jamestown-Yorktown foundation, a public foundation created by the state to preserve the historical quarters of the original Jamestown settlement, has the power of eminent domain in order to take property that would advance its historical mission, but any exercise of the eminent domain power must be approved by the governor, a directly elected official. VA. CODE ANN. § 23-288 (West 2006).

234. See, e.g., *supra* notes 23-41 (noting the requirement for state agency approval for an exercise of the takings power by a public utility); see also Lawrence, *supra* note 4, at 686 (discussing that "but many states have imposed additional procedural requirements on private condemners alone. Frequently statutes require private condemners to secure the approval of a state agency before initiating the condemnation action, and the agency may investigate the particular project quite closely to assure that it furthers the public interest.").

non-profit corporation.²³⁵ This largely economic remedy would go above and beyond any compensation paid to landowners for the value of their seized land. In the case of business owners, the damages provision could include the loss of goodwill and business losses. The damages could also extend to affected residents, who may not be landowners, but who are residential or commercial leaseholders. Similarly, damages could be extended to individuals in a community who are affected by a private, non-profit corporation's incompatible use of seized land in an area.²³⁶

A third approach is to mandate standard procedures, such as public hearings to which affected parties such as landowners, residents, community groups, and representatives of the private, non-profit corporation would be invited and given reasonable time and notice to air their views publicly about a proposed exercise of the takings power by the private non-profit. The hearings could be held directly before an elected body that will approve or disapprove an exercise of the takings delegation, such as in the DNI example. Hearings could also be conducted before an advisory body or state agency that will provide recommendations for action to elected officials who must provide final approval of an exercise of the takings power.

Moreover, not only could these hearings be used to air potentially opposing points of view related to a private non-profit's exercise of eminent domain power, but also they could be used to evaluate and to provide oversight of the charitable corporation's actions with respect to ways in which it has dealt with affected persons in the community and for its plans for the seized land. An example of this sort of oversight is also found in the DNI example, in which contingency plans for residents and landowners affected by DNI's use of eminent domain must be included in order for the city council and planning board to approve a revitalization project. Nonetheless, both types of hearings would likely add a veneer of fairness to an exercise of the takings power by a private non-profit corporation, especially one that is privately governed by a board of directors and that is shielded from public scrutiny, such as in the TMC case.

235. See Lawrence, *supra* note 4, at 691-92 (noting that “[o]ccasionally, a damages remedy might be a safeguard”); see also Professor Linda Crane, John Marshall Univ. Sch. of Law, Address in response to this Paper at the 2006 annual meeting of the Midwestern People of Color Legal Scholarship Conference (June 3, 2006).

236. See, e.g., *supra* note 144 and accompanying text.

Still a fourth statutory solution, that would counter-balance the effects of private board of directors' discussions and meetings concerning eminent domain that are largely held out of public view, is one that would mandate that these meetings be subject to a state's Open Records or Open Meetings Acts.²³⁷ This type of statutory provision may allow elected officials, who must approve a private exercise of eminent domain power, as well as persons affected by its exercise, to evaluate fully the consequences and justifications of the exercise.

In keeping with this fourth recommended solution, a fifth proposal is to ensure that the delegation is subject to a state's Sunset Act, in which there would be a time cap placed on the exercise of the takings power of perhaps five to ten years.²³⁸ This type of provision specifically addresses whether or not the private actor's actions are limited in duration.²³⁹

Yet a sixth solution is to include in enabling legislation that the exercise of the takings power be subject to a state's equivalent of the Administrative Procedure Act.²⁴⁰ This sort of statutory provision would treat private, charitable corporations in an equivalent manner to state agencies that also exercise public, coercive powers, injecting a level of procedural fairness and accountability into a non-profit's exercise of the takings power. It would also have the effect of mandating consistent, proven procedures in an exercise of eminent domain power.

B. Social Capital Impact Assessments ("SCIAs"): Opening Up the Process

A seventh legislative solution is to require that private, non-profit corporations perform a Social Capital Impact Assessment ("SCIA"), a study that would evaluate the impact of the exercise of the takings power on a community.²⁴¹ The idea of SCIAs largely derives from Environmental Impact Statements ("EIS") that are mandated in the National Environmental Policy Act ("NEPA") in response to any

237. Reeder, *supra* note 39, at 220.

238. *Id.*

239. This concern addresses the sixth factor of the original *Texas Boll Weevil* test. *Texas Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 472 (Tex. 1994).

240. *Id.*

241. See Asmara Tekle Johnson, *Desperate Cities: Eminent Domain and Economic Development in a Post-Kelo World*, 16 CORNELL J.L. & PUB. POL'Y (forthcoming 2007) (proposing the implementation of Social Capital Impact Assessments when eminent domain is used for economic development purposes in order to provide increased public transparency and accountability to these decisions).

action by a federal agency that may have a significant impact on the environment.²⁴² A draft EIS must be made available to the public early enough in the deliberative process in order for the public to comment meaningfully on an agency's decision.²⁴³ An agency must then respond to the public's comments in a final EIS.²⁴⁴

Although criticized for being too time-consuming, expensive, and unduly procedurally-oriented,²⁴⁵ the EIS process has been highly successful in opening up the decision-making process of federal agencies to previously disempowered community and environmental groups concerning determinations of these agencies that may significantly impact the physical environment.²⁴⁶ Indeed, EISs have been instrumental in forcing the redesign, reconsideration, or even withdrawal of decisions of federal agencies that severely impact the environment.²⁴⁷ The result has been to provide a framework for public debate concerning environmental decision-making that previously was non-existent.²⁴⁸

In the eminent domain arena, SCIAAs have been recommended as a way to involve and to empower oft-neglected community groups and

242. National Environmental Policy Act, 42 U.S.C. § 4332(C) (2006).

243. See Jeannette MacMillan, Note, *An International Dispute Reveals Weaknesses in Domestic Environmental Law: NAFTA, NEPA, and the Case of Mexican Trucks* (Department of Transportation v. Public Citizen), 32 *ECOLOGICAL L.Q.* 491, 494 (2005); see also Regulations for Implementing NEPA, 40 C.F.R. § 1501.7 (2006) (requiring that once an agency decides that it will undertake an EIS and before it publishes a draft EIS, it must publish a Notice of Intent that provides public participation in determining the "scope" of the EIS and significant issues related to it), and Regulations for Implementing NEPA, 40 C.F.R. § 1503.1 (2006) (inviting comments by the public and other agencies.)

244. See Regulations for Implementing NEPA, 40 C.F.R. § 1503.4 (2006) (requiring that the lead agency respond to the public's comments); see also Brian Cole et al., *Prospects for Health Impact Assessment in the United States: New and Improved Environmental Impact Assessment or Something Different?*, 29 *J. HEALTH POL. POL'Y & L.* 1153, 1162 (2004).

245. See MacMillan, *supra* note 243, at 521; see also Cole, *supra* note 244, at 1163, 1169 (noting that EISs can cost several hundred thousand to several million dollars and may take an average of one or two years, if not longer, to complete).

246. See Lynton K. Caldwell, *Beyond NEPA: Future Significance of the National Environmental Policy Act*, 22 *HARV. ENVTL. L. REV.* 203, 205, 207 (1998); see also MacMillan, *supra* note 243, at 529.

247. See Caldwell, *supra* note 246, at 207. For instance, the EIS process was instrumental in halting projects that affected old-growth forests and the northern spotted owl. See Thomas Sander, *Environmental Impact Statements and Their Lessons for Social Capital Analysis*, <http://www.ksg.harvard.edu/saguaro/pdfs/sandereisandsklessons.pdf> at 2 (last visited on Dec. 15, 2005) (citing Mark Bonnet & Mark Zimmerman, *Politics and Preservation: The Endangered Species Act and the Northern Spotted Owl*, *ECOLOGICAL L.Q.* 105-71 (1991)), and *N. Spotted Owl v. Hodel*, 716 F. Supp. 479 (D. Wash. 1988) (halting attempts to log the habitat of the northern spotted owl after it was declared a threatened species by the Fish & Wildlife Service).

248. Johnson, *supra* note 241.

individuals who are impacted by economic development takings using a similar process to EISs in the environmental/NEPA context.²⁴⁹ SCIAAs could be mandated either through enabling legislation or through the courts. They would assess the social impact of an economic development taking on a community by compelling the response of a governmental entity and its private partners to fourteen questions that address community concerns. These studies would also be provided to the public early enough for reasonable notice and comment by the public. Therefore, the idea is that, as in the environmental context, economic development takings would similarly be opened up.²⁵⁰ The relevant fourteen questions are as follows:

1. How will the taking or development project disrupt existing land uses?;
2. How will the taking or development affect neighborhood integrity?;
3. Will the taking or revitalization project displace and relocate homes, families, and businesses?;
4. What opposition, if any, exists to the taking or project?;
5. If neighborhood integrity is to be affected or the taking or revitalization project is to displace homes, families, and businesses, how can these effects be mitigated?;
6. If displacement and relocation identified in Question Three occur, how many homes, families, and businesses will be relocated?;
7. If displacement and relocation occur, how many opportunities will there be for displaced residents to occupy space in the new development as a home or as a small business?;²⁵¹
8. If there is no plan to have displaced residents occupy space in the new development as a home or as a small business, what proposals do the relevant government entities have to relocate residents or small business owners to an equivalent site?;
9. What is the economic impact of the displacement of these homes, families, and businesses on the city and state's purse, in the form of lost real property and sales taxes, jobs generated by small

249. *Id.*

250. *Id.*

251. Housing provisions in the new development plan for some of the displaced residents in *Berman v. Parker* were specifically noted by the Court in that case. 348 U.S. 26, 30-31 (1954). At least one-third of the new residential units were to be "low-rent housing with a maximum rent of \$17 per room per month." *Id.*

businesses that may be displaced, and revenues generated by these businesses?;

10. What is the ethnic and racial breakdown of the families who may be displaced?;

11. What is the promised economic impact of the takings, in terms of employment opportunities and tax revenue gained?;

12. Is the promised economic impact referred to in Question Eleven realistic and practical, in light of other potentially uncontrollable factors, such as the availability of financing for the project, key tenants and institutions that may occupy the project, or the economic health of these key tenants?;

13. What ties, if any, do the private entities that stand to gain from the economic development project have with any state or local governments exercising eminent domain or promulgating legislation in support of its exercise?; and

14. What alternatives exist to placing the economic development project in the proposed site?²⁵²

There is no reason, however, that SCIA's could not be expanded to go beyond economic development takings and to provide a global statutory solution to takings in general, especially those by private, non-profit actors delegated this power. Statutorily implemented SCIA's would likely address the major concerns of the Private Non-Delegation Doctrine and the *Texas Boll Weevil* test by essentially injecting public input and, consequently, a process of accountability into the takings decisions of private non-profit delegates. The effect of this process would be to mitigate any conflicting interests between the private delegate and the public and to lessen a noxious use of this power. For instance, in the NEPA/environmental arena, EISs are often made available to public officials for their public comments.²⁵³ By mandating that SCIA's concerning a private, non-profit entity's use of its delegated takings power be provided to pertinent elected officials, and subsequently providing a forum for officials to respond and to comment on a non-profit's proposed action, affected communities would be afforded a golden opportunity to determine their representatives' stance on a proposed taking. Communities could then subsequently decide their agreement with this stance on Election Day. At a minimum, however, this Article recommends that SCIA's be included as part of the "record" before elected officials or

252. Johnson, *supra* note 241.

253. See Caldwell, *supra* note 246, at 207; see also MacMillan, *supra* note 243, at 519-20.

before advisory groups to elected officials that have final say over a non-profit's exercise of the takings power.

CONCLUSION

In an era in which many services are privatized by government, from prisons to war, it is no surprise that the privatization movement would inevitably extend to the traditionally governmental, very public and coercive power of eminent domain. Having escaped the harsh scrutiny that followed the Court's *Kelo* decision and that upheld economic development takings that benefit for-profit private parties, takings by private, non-profit and charitable corporations merit equal concern nonetheless. These entities often operate in the shadows of governmental and electoral oversight and are largely governed by privately shielded boards of directors.

This Article advocates that state renderings of the Private Non-Delegation Doctrine, a doctrine that remains alive and well in state courts and that is based upon fundamental notions of accountability to the electorate, especially when interests of a private delegate may diverge from those of the public, provide an excellent legal and constitutional basis for assessing the delegation of the takings power by private non-profit corporations.

Moreover, the *Texas Boll Weevil*, a test used by the Texas Supreme Court to evaluate private delegations of power may serve as a model for analyzing private delegations of public power in general, but in particular delegations of the taking power to private non-profit or charitable corporations. Two examples of private non-profit or charitable corporations, the Dudley Neighborhood Initiative, Inc. in Boston, Massachusetts, and the Texas Medical Center in Houston, Texas, that have been delegated eminent domain power are put to the modified and original versions of the *Texas Boll Weevil* test. The result is one that illustrates that the two cases occupy opposite constitutional poles under their respective state Private Non-Delegation Doctrines.

As a way to ensure that unconstitutional delegations of the eminent domain power to private non-profit or charitable corporations survive state constitutional scrutiny under the Private Non-Delegation Doctrine, this Article advocates a number of statutory regimes for these types of delegation. Short of establishing a per se rule against the delegation of eminent domain to private, non-profit corporations, these statutory solutions, in a time where privatization is a popular panacea for a number of ills, may provide a

constitutional cure under the Private Non-Delegation Doctrine when the very public power of eminent domain is delegated to unaccountable private non-profit corporations.